TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 317.

FRANK G. GARDNER, AS TRUSTEE IN BANKRUPTCY OF THE O'GARA COAL COMPANY, PETITIONER,

vs.

CHICAGO TITLE & TRUST COMPANY, AS RECEIVER OF THE LA SALLE STREET TRUST AND SAVINGS BANK.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR CERTIORARI FILED APRIL 1, 1922.

CERTIORARI AND RETURN FILED MAY 13, 1922.

(28,801)

(28,801)

SUPREME COURT OF THE UNITED STATES.

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 21, 1922.

Placita.

Pleas in the District Court of the United States for the Northern District of Illinois, Eastern Division, begun and held at the United States Court Room, in the City of Chicago, in said District and Division, before the Honorable George A. Carpenter, District Judge of the United States for the Northern District of Illinois, on Thursday, the third day of February, in the year of our Lord one thousand nine hundred and 21, being one of the days of the regular December Term of said Court, begun Monday, the twentieth day of December, 1920, and of our Independence the 145th year.

Present:

Honorable George A. Carpenter, District Judge.
John J. Bradley, U. S. Marshal.
John H. R. Jamar, Clerk.

Filed Nov. 3, 1920.

In the District Court of the United States, Northern District of Illinois, Eastern Division.

In Bankruptcy.

No. 21311.

In the Matter of O'Gara Coal Company, Bankrupt.

Be it remembered, that there was filed in the office of Referee Sidney C. Eastman, on the third day of November, A. D. 1920, a certain petition for Review in words and figures following to-wit:

District Court of the United States, Northern District of Illinois, Eastern Division.

In Bankruptcy.

No. 21311.

In the Matter of O'Gara Coal Company, a Corporation, Bankrupt.

Petition for Review.

To Sidney C. Eastman, Esq.,
Referee in Bankruptcy:

Your petitioner, Chicago Title and Trust Company, as receiver of the La Salle Street Trust and Savings Bank, by this its petition says.

1. In the course of the proceedings in the above entitled matter on the 26th day of October, A. D. 1920, an order was made and entered by you in the words and figures following:

3 In the District Court of the United States for the Northern District of Illinois, Eastern Division.

In Bankruptcy.

No. 21311.

In the Matter of O'Gara Coal Company, a Corporation, Bankrupt.

At Chicago, in the Eastern Division of the Northern District of Illinois, Before Sidney C. Eastman, Referee in Bankruptcy. This 26th Day of October, A. D. 1920.

This cause coming on for hearing this day on the petition of William C. Niblack, former Trustee herein, and the Supplemental Petition of Frank G. Gardner, Trustee herein, the Amended Answer thereto of William C. Niblack, former Receiver, and the Chicago Title and Trust Company, as Receiver of the La Salle Street Trust and Savings Bank, an Illinois banking corporation, on the admissions of fact of counsel made in open court, which admissions are to be give- the same force and effect as if the facts admitted were alleged in the pleadings, and on the arguments of counsel, the court, being now fully advised in the premises, Finds from the pleadings and said admissions of fact, the following:

1. On September 13, A. D. 1913, a creditors' petition in bankruptcy was filed in the above entitled court and cause and a decree was entered therein by the court on October 3, A. D. 1913, adjudicating said O'Gara Coal Company a bankrupt.

2. On November 11, A. D. 1913, Thomas J. O'Gara, Fred A. Busse and Edward Weltman were duly appointed and qualified as trustees in bankruptcy of said O'Gara Coal Company, and said Fred A. Busse continued to act as one of said trustees until his death, which occurred prior to July 28, 1914, on which last mentioned day said William C. Niblack was duly appointed and qualified as trus-
4 tee in bankruptcy as successor to said Fred A. Bussee, and thereafter said Thomas J. O'Gara, said Edward Weltman and said William C. Niblack continued to act as such trustees until June 30, 1916, at which time said William C. Niblack became the sole trustee in bankruptcy of said bankrupt estate, and continued to act as such up to the time of his death on the sixth day of June, 1920; that thereupon the petitioner, Frank G. Gardner was appointed and is now acting as such trustee and ever since then has been and now is vested with the exclusive right, title and interest in and to all of the assets of said bankrupt as of September 13, A. D. 1913, and such additional property and estate of said bankrupt as came into existence subsequent to said date last mentioned.

On or about September 6, A. D. 1913, the bankrupt, O'Gara Company, for a valuable consideration, executed and delivered ertain demand note payable to the order of one C. B. Munday, he sum of Fifteen Thousand Dollars ($15,000), with interest on at the rate of six per cent. per annum after date, and to e payment of the same said bankrupt delivered to said C. B. day Fifteen Hundred (1,500) shares of the capital stock of the risburg-Saline Collieries Company, an Illinois corporation, now krupt, the estate of which is now pending in administration in District Court, and said shares of stock, which were of the par e of One Hundred Dollars ($100.) each, constituted the entire horized capital stock of said Harrisburg-Saline Collieries Comy.

. On the 8th day of September, A. D. 1913, said C. B. Munday, a valuable consideration, to-wit, the sum of Fifteen Thousand lars ($15,000.) to him in hand paid by the La Salle Street Trust Savings Bank, endorsed said promissory notes without recourse l delivered the same, together with the collateral above described, said La Salle Street Trust & Savings Bank, an Illinois corporan, which continued thereafter to own and hold the same until suspension of said Trust and Savings Bank and the appointment its receiver, *which suspension and appointment of its receiver,* ich suspension and appointment is hereinafter shown, and no t of said promissory note, either the principal or interest thereon, s ever collected by said Trust & Savings Bank or its said receiver.

5. On or about June 12, A. D. 1914, said La Salle Street Trust Savings Bank, the same having previously become insolvent, ceased to transact business and discharge its corporate functions, and on June 18, A. D. 1914, the People of the State of Illinois, on the relation of James J. Brady, then Auditor Public Accounts of the State of Illinois, filed a bill in chancery the Circuit Court of Cook County, Illinois, against said Trust and vings Bank and its stockholders, in which said suit such proceedgs were had that on June 18, A. D. 1914, said William C. Niblack s duly appointed receiver of said La Salle Street Trust & Savings nk and duly qualified and entered upon the discharge of his duties such receiver, and took possession of the assets of said La Salle reet Trust & Savings Bank, including therein the said promissory te and the collateral above described, and continued to act until e date of his death on June 6, 1920; that the Chicago Title and rust Company was thereupon appointed Receiver and has ever since tained and now has possession and control of the same, and is ow proceeding, under the direction of said Circuit Court of Cook ounty, with the administration of the assets of said La Salle Street rust & Savings Bank, said La Salle Street Trust & Savings Bank aving been, on January 18, A. D. 1915, duly dissolved by a decree f said Circuit Court.

6. Prior to the suspension of business by said La Salle Street Trust & Savings Bank, and at various dates from and after Novem-

ber 11, 1913, and down to June 11, 1914, said Thomas J. O'Gara, Fred A. Busse and Edward Weltman, they then being the joint trustees in bankruptcy of said estate of O'Gara Coal Company and duly elected, qualified and so acting, deposited in said La Salle Street Trust & Savings Bank, a duly designated depositary for moneys of bankrupt estates in and for the division aforesaid, funds of said estate of O'Gara Coal Company; which said deposits were duly credited to said trustees on the books of said bank and said deposits at the close of business on June 11, 1914, when said Trust and Savings Bank suspended, aggregated the sum of $19,843.62, which said sum was then due and owing to said trustees on behalf of said bankrupt estate of O'Gara Coal Company, and the same, except as to the dividends subsequently paid thereon as hereinafter stated, is now legally due and owing to petitioner, as trustee of said bankrupt estate.

7. On June 6, A. D. 1916, said Thomas J. O'Gara, William C. Niblack and Edward Weltman, trustees as aforesaid, duly filed in the Circuit Court of Cook County, Illinois, in said receivership proceedings against the La Salle Street Trust & Savings Bank
6 their certain verified proof of claim against said Trust and Savings Bank, which claim was duly allowed by said Circuit Court for the sum of $19,843.62 as a claim against the assets of said insolvent La Salle Street Trust & Savings Bank, to be paid in due course of administration pro rata with the claims of other general creditors of said Trust and Savings Bank.

8. On or about August 14, A. D. 1916, said William C. Niblack, as receiver of said La Salle Street Trust & Savings Bank, in pursuance of an order of said Circuit Court of Cook County declaring a dividend payable to the creditors of said La Salle Street Trust & Savings Bank out of the proceeds of the assets thereof, paid to said William C. Niblack, as sole trustee in bankruptcy of said O'Gara Coal Company, upon said claim so allowed by said Circuit Court, the sum of $4,963.35 out of the proceeds of the assets of said Trust and Savings Bank, and on June 19, A. D. 1918, a further dividend of ten per cent., amounting to $1,985.34, was paid to said William C. Niblack, as trustee in bankruptcy as aforesaid, upon said claim, after the making of which payments there was left a balance due to said William C. Niblack, as sole trustee in bankruptcy, upon the principal of said claim, of the sum of $12,894.93.

9. On June 5, 1916, said Thomas J. O'Gara, Edward Weltman and William G. Niblack, in their capacity as joint trustees in bankruptcy of the estate of O'Gara Coal Company, a corporation, bankrupt, filed in the Circuit Court of Cook County, Illinois, in the suit of the People of the State of Illinois on the relation of James J. Brady, Auditor of Public Accounts of the State of Illinois, against the La Salle Street Trust & Savings Bank and its stockholders, their petition setting forth the deposit by said trustees in bankruptcy in said La Salle Street Trust & Savings Bank prior to the suspension thereof, of said sum of Nineteen Thousand Eight Hundred Forty-three Dollars and Sixty-two Cents ($19,843.62), and praying said

uit Court to allow in favor of said trustees in bankruptcy and nst said La Salle Street Trust & Savings Bank prior to the susion thereof said sum of Nineteen Thousand Eight Hundred y-three Dollars and Sixty-two Cents ($19,843.62), and praying Circuit Court to allow in favor of said trustees in bankruptcy against said La Salle Street Trust & Savings Bank a pred claim to the amount of $19,843.62 and to adjudge the same entitled to priority of payment out of the assets of said La Salle Street Trust & Savings Bank in the possession of respondent, as receiver thereof, in advance of the general unured creditors, or in the event that priority of said claim were ied, that said claim might be allowed for said sum as a general m against the assets of said insolvent, and for such other and ther relief as might be proper in th- pr-mises and consistent with ity and good conscience, which said petition was subsequently ndoned by said trustees in bankruptcy so far as it prayed for the owance of a preferred claim, and the said claim was allowed as a neral claim as hereinbefore stated.

10. On September 11, 1914, said William C. Niblack, as receiver said La Salle Street Trust & Savings Bank, filed a certain proof unsecured debt against said bankrupt estate of O'Gara Coal Comny in the above entitled court and cause, claiming the sum of fteen Thousand Nine Hundred Eight Dollars and Twenty Cents 15,908.20), with interest thereon at the rate of six per cent per nnum from September 6, A. D. 1913, upon the promissory note said bankrupt mentioned in paragraph number 3 above hereof, d thereafter, on August 21, 1917, filed an amended proof of seured debt upon said promissory note for the sum of Fifteen Thouand Dollars ($15,000.), with interest thereon as provided for by id note, but no payments have been made or dividends paid upon id claim or received thereon by the said Receiver out of the assets f said bankrupt estate, or otherwise.

11. Upon the foregoing facts the Court Finds as a matter of law hat said Frank G. Gardner, as trustee in bankruptcy of said O'Gara Coal Company, bankrupt, is entitled to have set-off against the laim of said Chicago Title & Trust Company, as receiver of the La Salle Street Trust & Savings Bank, the said sum of Twelve Thousand Eight Hundred Ninety-four Dollars and Ninety-three Cents ($12,894.93), and that upon the payment by said Frank G. Gardner, as trustee in bankruptcy as aforesaid, to Chicago Title and Trust Company, as receiver of said La Salle Street Trust & Savings Bank, of the balance due upon said promissory note, said Frank G. Gardner, as trustee in bankruptcy, as aforesaid, is entitled to the cancellation of said bankrupt's said promissory note and its delivery up to said Frank G. Gardner, as trustee in bankruptcy as aforesaid, together with said fifteen hundred (1,500) shares of the capital stock of said Harrisburg-Saline Collieries Company pledged as aforesaid as collateral security for the payment of said promissory note for Fifteen Thousand Dollars ($15,000.).

8 It is Therefore Ordered, Adjudged and Decreed by t Court that the prayer of the petition of said Frank G. Gar ner, as trustee in bankruptcy herein (as aforesaid), be and the sa is hereby granted, and that said Frank G. Gardner, as said Trus (in bankruptcy as aforesaid,) pay to said Chicago Title and Tr Company, as receiver of the La Salle Street Trust & Savings Ba the sum of — Dollars ($—), being the amount due and owing up said promissory note executed *see* b'k'pt for Fifteen Thousand D lars ($15,000.) after allowing thereon as a set-off the sum of Twel Thousand Eight Hundred Ninety-four Dollars and Ninety-thr Cents ($12,894.93), and that upon said payment being made t liability of said bankrupt upon said note be extinguished and sa Chicago Title and Trust Company, as receiver of said La Salle Stre Trust & Savings Bank, deliver to said Frank G. Gardner, as trust in bankruptcy, as aforesaid, the said promissory note duly ca celled, and surrender to said Frank G. Gardner, as trustee in ban ruptcy, as aforesaid, said fifteen hundred (1,500) shares of t capital stock of said Harrisburg-Saline Collieries Company.

It is Further Ordered, Adjudged and Decreed by the Court th upon the payment herein provided to be made by said Frank Gardner, as trustee in bankruptcy as aforesaid, to said Chicago Ti and Trust Company, as receiver of the La Salle Street Trust & Sa ings Bank, and the cancellation and surrender of said note and t surrender of said collateral, the claims of said receiver herein fil and identified as Numbers 222 and 267 respectively, shall stand satisfied in full on the records of said bankrupt estate in the abo entitled court and cause and the claim of said Frank G. Gardn as trustee in bankruptcy as aforesaid, against said La Salle Stre Trust & Savings Bank shall be deemed paid and satisfied.

2. Said order was and is erroneous and void in that it was a is contrary to the evidence and to the facts recited therein a contrary to the law applicable to the evidence and to said facts, a the same is in fact a nullity.

Wherefore your petitioner prays that the said order may be viewed as provided in the Bankruptcy Act of 1898, General Or XXVII.

Dated November 1, 1920.

CHICAGO TITLE & TRUST
COMPANY,
Receiver of the La Salle Street Trust &
Savings Bank, Petitioner.

9 State of Illinois,
Cook County, ss:

Abel Davis, being first duly sworn, on oath deposes and says th he is vice president of Chicago Title and Trust Company which the receiver of the La Salle Street Trust and Savings Bank and t petitioner in the foregoing petition; that he has read the said pe

on and knows the contents thereof and that the same is true according to the best of his knowledge, information and belief.

ABEL DAVIS.

Subscribed and sworn to before me this 1st day of November, 1920.

[SEAL.]

ALBERT L. HALL,
Notary Public.

(Endorsed:) Filed Nov. 3—1920. Sidney C. Eastman, Referee.

Certificate for Review.

Filed Nov. 5, 1920.

And on to-wit: the fifth day of November, 1920, there was filed in the office of the Clerk of said Court a certain Certificate for Review in words and figures following, to-wit:

In the District Court of the United States for the Northern District of Illinois, Eastern Division.

In Bankruptcy.

No. 21311.

In the Matter of O'GARA COAL COMPANY, Bankrupt.

I, Sidney C. Eastman, one of the referees of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me, the following question arose pertinent to the said proceedings:

I. On August 21, 1917, William C. Niblack, receiver of the La Salle Street Trust and Savings Bank, filed a claim herein for $15,000 with interest at 6% from September 6, 1913, secured by certain stock of the Harrisburg-Saline Collieries Company. This claim is hereto attached and marked "Exhibit A."

II. On May 22, 1918, the trustee herein filed his petition praying to set off an indebtedness of the La Salle Street Trust & Savings Bank to the trustee against said claim. This petition is hereto attached and marked "Exhibit B."

III. On May 27, 1918, William C. Niblack, claimant, filed his answer to said petition, which answer is hereto attached and marked "Exhibit C."

IV. On October 26, 1920, after hearing, I entered an order allowing the set off as prayed by the trustee. A copy of this order is incorporated in the petition for review hereinafter referred to.

V. On November 3, 1920, the Chicago Title & Trust Company, successor to William C. Niblack, receiver of the La Salle Street Trust & Savings Bank, claimant, filed a petition for a review of said order, which petition is hereto attached and marked "Exhibit D."

All the facts and findings of law and fact are fully set out in the order incorporated in the said petition for review.

And the said question is certified to the Judge for his opinion thereon.

Dated at Chicago, the 4th day of November, 1920.

SIDNEY C. EASTMAN,
Referee in Bankruptcy.

11 EXHIBIT A.

Proof of Secured Debt.

In the District Court of the United States for the Northern District of Illinois, Eastern Division.

In Bankruptcy.

No. 21311.

In the Matter of O'GARA COAL COMPANY, a Corporation, Bankrupt.

UNITED STATES OF AMERICA,
Northern District of Illinois,
State of Illinois,
County of Cook, ss:

At Chicago, in said Northern District of Illinois, on the 15th day of August, A. D. 1917, came William C. Niblack, as Receiver of the La Salle Street Trust & Savings Bank, of Chicago, in the County of Cook in said Northern District of Illinois, and State of Illinois, and made oath and says, that O'Gara Coal Company, a corporation, the person against whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition and still is justly and truly indebted to said La Salle Street Trust & Savings Bank, an Illinois banking corporation, to whose rights and credits said deponent has succeeded, in the sum of fifteen thousand dollars ($15,000.00) with interest thereon from September 6, A. D. 1913, at the rate of six per cent per annum; that the consideration of said debt is as follows:

For money loaned to said bankrupt, evidenced by its note delivered to said La Salle Street Trust & Savings Bank, a copy whereof, substituted for the original is hereto attached; that no part of said debt has been paid; that there are no set-offs or counterclaims to the same and that the only securities held by this doponent for said debt are the following:

Cert. #134 for 1 share of the capital stock of the Harrisburg Saline Collieries Co. a corporation, issued to Thomas J. O'Gara;
" #142 for 347 shares of same, issued to W. A. Brewerton,

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" #143 for one share of same, issued to Thomas S. Jones,
" #144 for one share of same, issued to Joseph E. Ward,
" #147 for one share of same, issued to L. J. Walsh,
" #148 for 39 shares of same, issued to T. J. O'Gara,
" #151 for 1,110 shares of same, issued to O'Gara Coal Company,

representing the total authorized capital stock of said Harrisburg Saline Collieries Company, a corporation, of fifteen hundred shares of the par value of $100.00 per share, a total of $150,000.00; that all of said securities pledged with said La Salle Street Trust & Savings Bank by said bankrupt, as collateral security, for the payment of the promissory note of said bankrupt, are now held by and are in the possession of this deponent, subject to said indebtedness stated, and subject to redemption upon payment to this deponent of the amount due upon said note; that no valid or bona fide sale of said securities was heretofore made by said La Salle Street Trust & Savings Bank, or by any one claiming through or under said bank, and that the foregoing proof of debt is made by this deponent by way of amendment to his proof of debt heretofore and on to-wit: September 11, A. D. 1914, filed in the above entitled Court and cause.

WILLIAM C. NIBLACK,
As Receiver of the La Salle Street Trust & Savings Bank Aforesaid, Creditor.

Subscribed and sworn to before me this 15th day of August, A. D. 1917.

[SEAL.]

MAUDE ROWELL,
Notary Public.

My Commission expires Oct. 5, 1920.

13 In the District Court of the United States for the Northern District of Illinois, Eastern Division.

In Bankruptcy.

No. 21311.

In the Matter of O'GARA COAL COMPANY, a Corporation, Bankrupt.

To Hiram T. Gilbert, Esq., Chicago, Illinois:

I, William C. Niblack, as Receiver of the La Salle Street Trust & Savings Bank, an Illinois Banking corporation, of Chicago, in the County of Cook and State of Illinois, do hereby authorize you

to attend the meeting or meetings of creditors of the bankrupt aforesaid, at a court of bankruptcy, wherever advertised or directed to be holden, on the day and at the hour appointed and notified by said Court in said matter, or at such other place and time as may be appointed by the Court, for the holding such meeting or meetings or at which such meeting or meetings, or any adjournment or adjournments thereof may be held, and then and there from time to time, and as often as there may be occasion, for me and in my name to vote for or against any proposal or resolution that may be then submitted under the Acts of Congress relating to bankruptcy; and in the choice of trustee or trustees of the estate of the said bankrupt, and for me to assent to such appointment of trustee; and with like powers to attend and vote at any other meeting or meetings of creditors, or sitting or sittings of the Court, which may be held therein, for any of the purposes aforesaid; also to accept any composition proposed by said bankrupt in satisfaction of its debts, and to receive payment of dividends and of money due me under any composition, and for any other purpose in my interest whatsoever, with full power of substitution. This letter of attorney and power is intended to and shall supersede, annul, revoke and terminate a similar letter of attorney and power directed to William A. Rogan, of Chicago, Illinois, and executed by me on to-wit: September 11, A. D. 1914.

In Witness Whereof, I have hereunto signed my name and
14 affixed my seal as Receiver aforesaid, the 15th day of August A. D. 1917.

[SEAL.] WILLIAM C. NIBLACK,
As Receiver of the La Salle Street Trust & Savings Bank Aforesaid.

Acknowledged before me this 15th day of August, A. D. 1917.

[SEAL.] MAUDE ROWELL,
Notary Public.

My commission expires Oct. 5, 1920.

Copy.

Collateral Note.

$15,000.00. Chicago, Sept. 6, 1913.

On Demand, after date, for Value Received, we Promise to Pay to the order of C. B. Munday the sum of fifteen thousand Dollars, at The La Salle Street Trust & Savings Bank, Chicago, with interest at the rate of six (6) per cent, per annum after date having deposited with said C. B. Munday as collateral security,

Cert. #134 for 1 share Harrisburg Saline Collieries Co. T. J. O'Gara,
142 for 347 shares Harrisburg Saline Collieries Co. W. A. Brewerton,

143 for 1 share Harrisburg Saline Collieries Co. Thomas S. Jones
144 for 1 share Harrisburg Saline Collieries Co. Jos. E. Ward.
147 for 1 share Harrisburg Saline Collieries Co. L. J. Walsh
148 for 39 shares Harrisburg Saline Collieries Co. T. J. O'Gara
151 for 1,110 shares Harrisburg Saline Collieries Co. O'Gara Coal Co.

hich we hereby give the said C. B. Munday, his agent, or assignee, uthority to sell, or any part thereof, on the maturity of this note, r at any time thereafter, or before in the event of said securi- es depreciating in value, in the opinion of said C. B. Munday at ublic or private sale, at the discretion of said C. B. Munday, his gent or his assignee, without advertising the same, or demanding ayment, or giving us any notice, and to apply so much of the pro- ceeds thereof to the payment of this Note as may be neces- sary to pay the same, with all interest due thereon, and also to the payment of all expenses attending the sale of the said ollateral including Attorney's fees; and in case the proceeds of the ale of the said collateral shall not cover the principal, interest, and xpenses, we promise to pay the deficiency forthwith, after such sale. And at any sale of said collaterals, or any part thereof, made by irtue hereof, it shall be optional with the legal owner or holder f this Note to bid for and purchase said collaterals or any part hereof.

O'GARA COAL CO.,
By T. J. O'GARA,
Pres.

Due —— —, ——.

Know All Men By These Presents, That we, the Subscribers being justly indebted to C. B. Munday upon the above written Promissory note, bearing even date herewith, for the sum of fifteen thousand dollars, with interest at the rate of six (6) per cent per annum after date and due on demand after date.

Now Therefore, in Consideration of the Premises, we do hereby make, constitute and appoint C. B. Munday or any Attorney of any Court of Record, to be our true and lawful Attorney, irrevocably, for us and in our name, place, and stead, to appear in any Court of Record, in term time or in vacation, in any of the States or Territories of the United States, or elsewhere, at any time after said Note becomes due, to waive the service of process, and confess a judgment in favor of the said C. B. Munday, his agent or his assigns or assignees, upon the said Note, for the amount thereof, and interest thereon to the day of the entry of the said judgment, together with costs, and One hundred dollars, Attorney's fees; and also, to file a cognovit for the amount thereof, with an agreement therein that no writ of error or appeal shall be prosecuted upon the judgment entered by virtue hereof, nor any bill in equity filed to interfere in any manner with the operation of said judgment, or issuing the execution

thereon; and, also, to waive all said judgment, or issuing the execution thereon; and, also, to waive all benefit or advantage to which we may be entitled by virtue of any Homestead or other Exemption Law *nor* or thereafter in force, in this or any State or Territory, where judgment may be entered by virtue hereof; hereby ratifying and confirming all that the said Attorney may do by virtue hereof.

16 Witness our hand and seal, this sixth (6) day of September, A. D. 1913.

O'GARA COAL CO., [SEAL.]
By T. J. O'GARA, [SEAL.]
Pres.

In presence of

CHAS. E. WARD.

(Endorsed:) Filed August 21, 1917, at 10 A. M. Sidney C. Eastman, Referee.

EXHIBIT B.

In the District Court of the United States for the Northern District of Illinois, Eastern Division.

In Bankruptcy.

No. 21311.

In the Matter of O'GARA COAL COMPANY, a Corporation, Bankrupt.

To the Honorable Sidney C. Eastman, referee in bankruptcy, before whom said cause is pending on general reference:

The petitioner, William C. Niblack, of Chicago, Illinois, by this petition respectfully represents;

1. That he is the sole acting Trustee in bankruptcy of the above entitled estate, having become such by resignation of his co-trustees, Thomas J. O'Gara and Edward Weltman, whose respective resignations were tendered to and accepted by said District Court, evidenced by its order entered on June 30th, A. D. 1916; that no successors to said Trustees resigned were either appointed by the Court, or elected by creditors, and that this petitioner is accordingly vested with the exclusive right, title and interest in and to all of the assets, of said bankrupt estate, as of the 13th day of September, A. D. 1913, on which day bankruptcy proceedings were instituted herein.

2. On information and belief this petitioner avers, that on or about September 6, A. D. 1913, the said bankrupt, O'Gara Coal Company, made, executed and delivered its certain demand note, payable to the order of one C. B. Munday, for the sum of fifteen thousand dollars ($15,000.00), with interest due thereon at the rate of six

per cent per annum after the date thereof, and to secure the payment of said note, said bankrupt delivered to the payee therein named, fifteen hundred shares of the capital ock of the Harrisburg Saline Collieries Company, an Illinois cor-oration (the estate of which is now pending in administration in is Court); that said shares of stock of the par value of one hundred ollars each, constitute the entire authorized issue of the capital ock of said corporation.

3. On information and belief, your petitioner further avers, that aid promissory note was by the said C. B. Munday endorsed in blank ithout recourse, and by him delivered to the La Salle Street Trust Savings Bank, an Illinois banking corporation, together with the ollateral described, securing its payment; that thereafter, on June 2th, A. D. 1914, said bank ceased to transact business and to dis-harge its corporation functions, whereupon on June 18, A. D. 1914, n the relation of James J. Brady, auditor of public accounts of the tate of Illinois, a bill in chancery was filed, in the name of The People of the State of Illinois, in the Circuit Court of Cook County, wherein it was alleged among other things, that said La Salle Street Trust & Savings Bank (one of the defendants to said bill named), was insolvent and that a Receiver should be appointed for the pur-pose of conserving its assets; that on said day last mentioned your petitioner, William C. Niblack, was appointed Receiver of said bank, qualified as such, and took possession of its property, assets and effects, including therein the said promissory note described, and the collateral thereto appertaining and that said Receiver now has pos-session and control of the same.

4. On information and belief, your petitioner further avers, that at sundry times from and after November 11th, A. D. 1913, and con-tinuing to and unto to-wit: June 18, A. D. 1914, Thomas J. O'Gara, Fred A. Busse (since deceased), and Edward Weltman, then con-stituting the joint Trustees in bankruptcy of said estate of O'Gara Coal Company, and duly elected, qualified and so acting, deposited in said La Salle Street Trust and Savings Bank (a duly designated depository for moneys of bankrupt estates in and for the District and Division aforesaid.) funds of said estate of O'Gara Coal Com-pany, which deposits were duly credited to said Trustees named; that said deposits on to-wit: June 18, A. D. 1914, aggregated the sum of $19,843.62, which said sum was then due and owing to said Trustees, on behalf of said bankrupt estate of O'Gara Coal Company, and which is now legally due and owing to your petitioner, as suc-cessor in title to said Trustees; that no part of said amount
18 has been paid excepting only the sum of to-wit: $4,963.35, representing a first dividend of twenty-five per cent, hereto-fore declared and paid by the Receiver upon the indebtedness of said La Salle Street Trust & Savings Bank.

5. Your petitioner further alleges, that by virtue of the Act of Congress then and now in force, relating to Bankruptcy, and more particularly by Section 68 thereof, he as Trustee aforesaid, is en-

titled to off-set against the claim of said Receiver, of the La Salle Street Trust and Savings Bank, the amount due to said estate of O'Gara Coal Company, and unpaid, to-wit: the sum of $14,880.2[illegible]; and that upon payment of such balance, if any, as may remain due upon the note of said bankrupt O'Gara Coal Company, to said La Salle Street Trust & Savings Bank, the collateral held by said Receiver, consisting of fifteen hundred shares of the capital stock of said Harrisburg Saline Collieries Company, should in equity be released and possession thereof decreed to your petitioner.

Wherefore, your petitioner prays the entry of an order, directing the Receiver of said La Salle Street Trust & Savings Bank (hereby made a respondent to this petition), to answer the same by a short day, and that upon the hearing of said petition and answer, an order or decree may be entered, off-setting the amount due to your petitioner from said La Salle Street Trust & Savings Bank, against the indebtedness of said bankrupt, O'Gara Coal Company, due to said bank, and that upon adjustment and payment of whatever balance, if any, may be decreed as due to said Receiver from your petitioner, such order or decree may further direct that the Receiver of said La Salle Street Trust & Savings Bank shall deliver to your petitioner all of the aforesaid collateral, held by him, to secure the payment of said bankrupt's note, and for such other, further and incidental relief as may be proper herein, all without prejudice to such claim as your petitioner may have for priority (should the foregoing petition be denied), against said La Salle Street Trust & Savings Bank, as well as the Illinois Surety Company, the surety upon the bond of said La Salle Street Trust & Savings Bank, heretofore executed and delivered to the United States of America, as required by law.

WILLIAM C. NIBLACK,
Sole Acting Trustee in Bankruptcy of the Estate of O'Gara Coal Company.

19 United States of America,
Northern District of Illinois,
State of Illinois, County of Cook, ss:

William C. Niblack, being first duly sworn, on oath deposes and says, that he is the petitioner named in the foregoing petition by him subscribed; that he has read said petition and knows the contents thereof, and that the statements of fact therein contained are true, according to the best of his knowledge, information and belief.

WILLIAM C. NIBLACK.

Subscribed and sworn to before me this 21st day of May, A. D. 1918.

[SEAL.]

MAUDE ROWELL,
Notary Public.

(Endorsed:) Filed May 22, 1918. Sidney S. Eastman, Referee.

EXHIBIT C.

ict Court of the United States, Northern District of Illinois, Eastern Division.

In Bankruptcy.

No. 21311.

he Matter of O'GARA COAL COMPANY, a Corporation, Bankrupt.

ver of William C. Niblack, in His Capacity as Receiver of the Salle Street Trust & Savings Bank, to the Petition of William Niblack, in His Capacity as Sole Acting Trustee in Bankruptcy O'Gara Coal Company, a Corporation, Bankrupt.

espondent William C. Niblack, as receiver of the La Salle Street t and Savings Bank, for answer to said petition, says:

Respondent admits the facts set forth and alleged in paragraphs 3, and 4 of said petition.

Respondent denies that by virtue of the actsof Congress, then and in force relating to bankruptcy and more particularly by Sec- 68 thereof, or otherwise, petitioner, as trustee in bankruptcy as aforesaid, is entitled to set off against the claim of respondent, as receiver of said La Salle Street Trust & Savings Bank, the said sum of $14,880.27, or any portion thereof, or that upon payment of such balance, if any, as might remain due upon the of said bankrupt, O'Gara Coal Company, to said La Salle Street st and Savings Bank, the collateral held by respondent, as re- er aforesaid, consisting of 1,500 shares of the capital stock of said risburg-Saline Collieries Company should in equity be released possession thereof decreed to petitioner, as trustee in bankruptcy foresaid, but on the contrary, respondent says that petitioner, as tee in bankruptcy, is not entitled to set off any amount whatever inst the amount of said promissory note and interest thereon or eceive from respondent, as receiver of said La Salle Street Trust Savings Bank, said 1,500 shares of the capital stock of said Har- urg-Saline Collieries Company, or any portion thereof, until pe- oner, as trustee in bankruptcy as aforesaid, has paid to respondent, eceiver of said La Salle Street Trust and Savings Bank, the full ount of said promissory note with interest.

Therefore respondent, having fully answered said petition, prays t the same may be dismissed with costs.

WILLIAM C. NIBLACK,
Receiver of the La Salle Street Trust & Savings Bank,
By HIRAM T. GILBERT,
His Solicitor.

United States of America,
Northern District of Illinois,
State of Illinois, Cook County, ss:

William C. Niblack being first duly sworn on his oath deposes and says that he is the respondent named in the foregoing answer by him subscribed; that he has read the said answer and knows the contents thereof and that the statements of facts therein contained are true according to the best of his knowledge, information and belief.

WILLIAM C. NIBLACK.

Subscribed and sworn to before me this 22nd day of May, A. D. 1918.

[SEAL.] ALBERT L. HALL,
Notary Public.

(Endorsed:) Filed May 27, 1918. Sidney C. Eastman, Referee.

21 Exhibit D.

Filed Before Referee 11/3/1920.

District Court of the United States, Northern District of Illinois, Eastern Division.

In Bankruptcy.

No. 21311.

In the Matter of O'Gara Coal Company, a Corporation, Bankrupt.

Petition for Review.

To Sidney C. Eastman, Esq., Referee in Bankruptcy:

Your petitioner, Chicago Title and Trust Company, as receiver of the La Salle Street Trust and Savings Bank, by this its petition says:

1. In the course of the proceedings in the above entitled matter on the 26th day of October, A. D. 1920, an order was made and entered by you in the words and figures following:

the District Court of the United States for the Northern District of Illinois, Eastern Division.

In Bankruptcy.

No. 21311.

the Matter of O'GARA COAL COMPANY, a Corporation, Bankrupt.

Chicago, in the Eastern Division of the Northern District of Illinois, Before Sidney C. Eastman, Referee in Bankruptcy, This 26th Day of October, A. D. 1920.

This cause coming on for hearing this day on the petition of William C. Niblack, former Trustee herein, and the Supplemental Petition of Frank G. Gardner, Trustee herein, the Amended Answer thereto of William C. Niblack, former Receiver, and Chicago Title and Trust Company, as Receiver of the La Salle eet Trust and Savings Bank, an Illinois banking corporation, on admissions of fact of counsel made in open court, which admisns are to be given the same force and effect as if the facts admitted re alleged in the pleadings, and on the arguments of counsel, the irt, being now fully advised in the premises, Finds from the pleads and said admissions of fact, the following:

1. On September 13, A. D. 1913, a creditors' petition in bankptcy was filed in the above entitled court and cause and a decree s entered therein by the court on October 3, A. D. 1913, adjuditing said O'Gara Coal Company a bankrupt.

2. On November 11, A. D. 1913, Thomas J. O'Gara, Fred A. Busse d Edward Weltman were duly appointed and qualified as trustees bankruptcy of said O'Gara Coal Company, and said Fred A. Busse ntinued to act as one of said trustees until his death, which occurred ior to Ju-y 28, 1914, on which last mentioned day said William C. black was duly appointed and qualified as trustee in bankruptcy as ccessor to said Fred A. Busse, and thereafter said Thomas J. Gara, said Edward Weltman and said William C. Niblick conued to act as such trustees until June 30, 1916, at which time said illiam C. Niblack became the sole trustee in bankruptcy of said nkrupt estate, and continued to act as such up to the time of his ath on the sixth day of June, 1920; that thereupon the petitioner, rank C. Gardner was appointed and is now acting as such trustee d ever since then has been and now is vested with the exclusive ght, title and interest in and to all of the assets of said bankrupt as September 13, A. D. 1913, and such additional property and estate said bankrupt as came into existence subsequent to said date last entioned.

3. On or about September 6, A. D. 1913, the bankrupt, O'Gara oal Company, for a valuable consideration, executed and delivered

its certain demand note payable to the order of one C. B. Munday, for the sum of Fifteen Thousand Dollars ($15,000), with interest thereon at the rate of six per cent per annum after date, and to secure payment of the same said bankrupt delivered to said C. B. Munday Fifteen Hundred (1,500) shares of the capital stock of the Harrisburg-Saline Collieries Company, an Illinois corporation, now bankrupt, the estate of which is now pending in administration in
23 said District Court, and said shares of stock, which were of the par value of One Hundred Dollars ($100) each, constituted the entire authorized capital stock of said Harrisburg-Saline Collieries Company.

4. On the 8th day of September, A. D. 1913, said C. B. Munday, for valuable consideration, to wit the sum of Fifteen Thousand Dollars ($15,000) to him in hand paid by the La Salle Street Trust & Savings Bank, endorsed said promissory note without recourse and delivered the same, together with the collateral above described, to said La Salle Street Trust & Savings Bank, an Illinois corporation, which continued thereafter to own and hold the same until the suspension of said Trust and Savings Bank and the appointment of its receiver, which suspension and appointment is hereinafter shown, and no part of said promissory note, either the principal or interest thereon, was ever collected by said Trust & Savings Bank or its said receiver.

5. On or about June 12, A. D. 1914, said La Salle Street Trust & Savings Bank, the same having previously become insolvent, ceased to transact business and discharge its corporate functions, and on June 18, A. D. 1914, the People of the State of Illinois, on the relation of James J. Brady, then Auditor of Public Accounts of the State of Illinois, filed a bill in chancery in the Circuit Court of Cook County, Illinois, against said Trust and Savings Bank and its stockholders, in which said suit such proceedings were had that on June 18, A. D. 1914, said William C. Niblack was duly appointed receiver of said La Salle Street Trust & Savings Bank and duly qualified and entered upon the discharge of his duties as such receiver, and took possession of the assets of said La Salle Street Trust & Savings Bank, including therein the said promissory note and the collateral above described, and continued to act until the date of his death on June 6, 1920; that the Chicago Title and Trust Company was thereupon appointed Receiver and has ever since retained and now has possession and control of the same, and is now proceeding, under the direction of said Circuit Court of Cook County, with the administration of the assets of said La Salle Street Trust & Savings Bank, said La Salle Street Trust & Savings Bank having been, on January 18, A. D. 1915, duly dissolved by a decree of said Circuit Court.

6. Prior to the suspension of business by said La Salle Street Trust & Savings Bank, and at various dates from and after November 11, 1913, and down to June 11, 1914, said Thomas J. O'Gara,
24 Fred A. Busse and Edward Weltman, they then being the joint trustees in bankruptcy of said estate of O'Gara Coal

Company and duly elected, qualified and so acting, deposited in said La Salle Street Trust & Savings Bank, a duly designated depositary for moneys of bankrupt estates in and for the division aforesaid, funds of said estate of O'Gara Coal Company; which said deposits were duly credited to said trustees on the books of said bank and said deposits at the close of business on June 11, 1914, when said Trust and Savings Bank suspended, aggregated the sum of $19,843.62, which said sum was then due and owing to said trustees on behalf of said bankrupt estate of O'Gara Coal Company, and the same, except as to the dividends subsequently paid thereon as hereinafter stated, is now legally due and owing to petitioner, as trustee of said bankrupt estate.

7. On June 6, A. D. 1916, said Thomas J. O'Gara, William C. Niblack and Edward Weltman, trustees as aforesaid, duly filed in the Circuit Court of Cook County, Illinois, in said receivership proceedings against the La Salle Street Trust & Savings Bank, their certain verified proof of claim against said Trust and Savings Bank, which claim was duly allowed by said Circuit Court for the sum of $19,843.62 as a claim against the assets of said insolvent La Salle Street Trust & Savings Bank, to be paid in due course of administration pro rata with the claims of other general creditors of said Trust and Savings Bank.

8. On or about August 14, A. D. 1916, said William C. Niblack, as receiver of said La Salle Street Trust & Savings Bank, in pursuance of an order of said Circuit Court of Cook County declaring a dividend payable to the creditors of said La Salle Street Trust & Savings Bank out of the proceeds of the assets thereof, paid to said William C. Niblack, as sole trustee in bankruptcy of said O'Gara Coal Company, upon said claim so allowed by said Circuit Court, the sum of $4,963.35 out of the proceeds of the assets of said Trust and Savings Bank, and on June 19, A. D. 1918, a further dividend of ten per cent, amounting to $1,985.34, was paid to said William C. Niblack, as trustee in bankruptcy as aforesaid, upon said claim, after the making of which payments there was left a balance due to said William C. Niblack, as sole trustee in bankruptcy, upon the principal of said claim, of the sum of $12,894.93.

9. On June 5, 1916, said Thomas J. O'Gara, Edward Weltman and William C. Niblack, in their capacity as joint trustees in bankruptcy of the estate of O'Gara Coal Company, a corporation, bankrupt, filed in the Circuit Court of Cook County, Illinois, in the suit of the People of the State of Illinois on the relation of James J. Brady, Auditor of Public Accounts of the State of Illinois, against the La Salle Street Trust & Savings Bank and its stockholders, their petition setting forth the deposit by said trustees in bankruptcy in said La Salle Street Trust & Savings Bank prior to the suspension thereof, of said sum of Nineteen Thousand Eight Hundred Forty-three Dollars and Sixty-two Cents ($19,843.62), and praying said Circuit Court to allow in favor of said trustees in bankruptcy and against said La Salle Street Trust & Savings Bank

prior to the suspension thereof said sum of Nineteen Thousand Eight Hundred Forty-three Dollars and Sixty-two Cents ($19,843.62), and praying said Circuit Court to allow in favor of said trustees in bankruptcy and against said La Salle Street Trust & Savings Bank a preferred claim to the amount of $19,843.62 and to adjudge the same entitled to priority of payment out of the assets of said La Salle Street Trust & Savings Bank in the possession of respondent, as receiver thereof, in advance of the general unsecured creditors, or in the event that priority of said claim were denied, that said claim might be allowed for said sum as a general claim against the assets of said insolvent, and for such other and further relief as might be proper in the premises and consistent with equity and good conscience, which said petition was subsequently abandoned by said trustees in bankruptcy so far as it prayed for the allowance of a preferred claim, and the said claim was allowed as a general claim as hereinbefore stated.

10. On September 11, 1914, said William C. Niblack, as receiver of said La Salle Street Trust & Savings Bank, filed a certain proof of unsecured debt against said bankrupt estate of O'Gara Coal Company in the above entitled court and cause, claiming the sum of Fifteen Thousand Nine Hundred Eight Dollars and Twenty Cents ($15,908.20), with interest thereon at the rate of six per cent per annum from September 6, A. D. 1913, upon the promissory note of said bankrupt mentioned in paragraph number 3 above hereof, and thereafter, on August 21, 1917, filed an amended proof of secured debt upon said promissory note for the sum of Fifteen Thousand Dollars ($15,000), with interest thereon as provided for by said note, but no payments have been made or dividends paid upon said
26 claim or received thereon by the said Receiver out of the assets of said bankrupt estate, or otherwise.

11. Upon the foregoing facts the Court Finds as a matter of law that said Frank G. Gardner, as trustee in bankruptcy of said O'Gara Coal Company, bankrupt, is entitled to have set-off against the claim of said Chicago Title & Trust Company, as receiver of the La Salle Street Trust & Savings Bank, the said sum of Twelve Thousand Eight Hundred Ninety-four Dollars and Ninety three Cents ($12,894.93), and that upon the payment by said Frank G. Gardner, as trustee in bankruptcy as aforesaid, to Chicago Title and Trust Company, as receiver of said La Salle Street Trust & Savings Bank, of the balance due upon said promissory note, said Frank G. Gardner, as trustee in bankruptcy as aforesaid, is entitled to the cancellation of said bankrupt's said promissory note and its delivery up to said Frank G. Gardner, as trustee in bankruptcy as aforesaid, together with said fifteen hundred (1,500) shares of the capital stock of said Harrisburg-Saline Collieries Company pledged as aforesaid as collateral security for the payment of said promissory note for Fifteen Thousand Dollars ($15,000).

It is Therefore Ordered, Adjudged and Decreed by the Court that the prayer of the petition of said Frank G. Gardner, as trustee in

bankruptcy herein (as aforesaid) be and the same is hereby granted, and that said Frank G. Gardner, as said trustee (in bankruptcy aforesaid), to pay to said Chicago Title and Trust Company, as receiver of the La Salle Street Trust & Savings Bank the sum of — Dollars ($—), being the amount due and owing upon said promissory note executed on bkpt. for Fifteen Thousand Dollars ($15,000) after allowing thereon as a set-off the sum of Twelve Thousand Eight Hundred Ninety-four Dollars and Ninety-three Cents ($12,894.93), and that upon said payment being made the liability of said bankrupt upon said note be extinguished and said Chicago Title and Trust Company, as receiver of said La Salle Street Trust & Savings Bank, deliver to said Frank G. Gardner, as trustee in bankruptcy, as aforesaid, the said promissory note duly cancelled, and surrender to said Frank G. Gardner, as trustee in bankruptcy, as aforesaid, said fifteen hundred (1,500) shares of the capital stock of said Harrisburg-Saline Collieries Company.

27 It is further ordered, adjudged and decreed by the Court that upon the payment herein provided to be made by said Frank G. Gardner, as trustee in bankruptcy as aforesaid, to said Chicago Title and Trust Company, as receiver of the La Salle Street Trust & Savings Bank, and the cancellation and surrender of said note and the surrender of said collateral, the claims of said receiver herein filed and identified as Numbers 222 and 267 respectively, shall stand as satisfied in full on the records of said bankrupt estate in the above entitled court and cause and the claim of said Frank G. Gardner, as trustee in bankruptcy as aforesaid, against said La Salle Street Trust & Savings Bank shall be deemed paid and satisfied.

2. Said order was and is erroneous and void in that it was and is contrary to the evidence and to the facts recited therein and contrary to the law applicable to the evidence and to said facts, and the same is in fact a nullity.

Wherefore your petitioner prays that the said order may be reviewed as provided in the Bankruptcy Act of 1898, General Order XXVII.

Dated November 1, 1920.

CHICAGO TITLE & TRUST COMPANY,
Receiver of the La Salle Street Trust & Savings Bank Petitioner.

STATE OF ILLINOIS,
Cook County, ss:

Abel Davis, being first duly sworn, on oath deposes and says that he is vice president of Chicago Title and Trust Company which is the receiver of the La Salle Street Trust and Savings Bank and the petitioner in the foregoing petition; that he has read the said petition and knows the contents thereof and that the same is true according to the best of his knowledge, information and belief.

ABEL DAVIS.

Subscribed and sworn to before me this 1st day of November, 192
[SEAL.] ALBERT L. HALL,
Notary Public.

(Endorsed:) Filed Nov. 3, 1920. Sidney C. Eastman Referee.

(Endorsed:) Filed Nov. 5, 1920. John H. R. Jamar, Clerk.

28 And on to-wit: the third day of February, 1921, the fol-
lowing order was entered:

Order of Feb. 3, 1921.

In the District Court of the United States for the Northern District
Illinois, Eastern Division.

Thursday, February 3, A. D. 1921.

Present: The Honorable George A. Carpenter, Judge.

No. 21311.

In re O'GARA COAL COMPANY, Bankrupt.

The Court having taken time to consider and being now full advised in the matter certified to the court by Referee in Bankrupte Sidney C. Eastman, by his certificate filed herein on November A. D. 1920, it is ordered that the order of Referee Sidney C. Eastma entered herein on October 26, A. D. 1920, directing that the pray of the petition of Frank G. Gardner, as trustee herein, be grante and that said Frank G. Bardiner, as said trustee, pay to said Chica Title and Trust Company, as receiver of the La Salle Street Tru & Savings Bank, the sum of — being the amount due and owi upon a promissory note executed by the Bankrupt to one C. Munday for Fifteen Thousand Dollars, after allowing thereon as set-off the sum of Twelve Thousand Eight Hundred Ninety-four Do lars and Ninety-three Cents, and that upon payment being made said amount, the liability of said bankrupt upon said note be ex tinguished and said Chicago Title and Trust Company, as receiver said La Salle Street Trust & Savings Bank, deliver to said Frank Gardner, as said trustee, the said promissory note duly cancelled, a surrender to said Frank G. Gardner, as trustee in bankruptcy as afor said, the fifteen hundred shares of the capital stock of the Harrisbur Saline Collieries Company, given by said Bankrupt to secure the pa ment of said promissory note; and directing further that upon t payment provided herein to be made by said Frank G. Gardner, trustee as aforesaid, to said Chicago Title & Trust Company, receiver as aforesaid, and the cancellation and surrender
29 said note and the surrender of said collateral, the claims
said receiver herein filed identified as Numbers 222 and 2
respectively, shall stand as satisfied in full on the records of sa

bankrupt estate in this court, and the cause and claim of said Frank G. Gardner, as trustee as aforesaid, against said La Salle Street Trust & Savings Bank be deemed paid and satisfied—be and the same hereby is affirmed.

And on to-wit: the eleventh day of February, 1921, there was filed in the office of the Clerk of said Court, a certain Petition in words and figures following to-wit:

Petition for Appeal.

Filed Feb. 11, 1921.

District Court of the United States, Northern District of Illinois, Eastern Division.

In Bankruptcy.

No. 21311.

In the Matter of O'Gara Coal Company, Bankrupt.

Chicago Title & Trust Company, as Receiver of the La Salle Street Trust & Savings Bank, Appellant,

vs.

Frank G. Gardner, as Trustee in Bankruptcy of O'Gara Coal Company, Appellee.

In the Matter of the Petition for Review of Chicago Title & Trust Company, as Receiver of the La Salle Street Trust and Savings Bank.

The above named petitioner, Chicago Title & Trust Company, as Receiver of the La Salle Street Trust & Savings Bank, conceiving itself aggrieved by the order entered on February 3, A. D. 1921, in the above entitled proceeding does hereby appeal from said order to the United States Circuit Court of Appeals for the Seventh
30 Circuit and it prays that this, its appeal, may be allowed: and that a transcript of the record and proceedings and papers on which said order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Seventh Circuit.

HIRAM T. GILBERT,
Attorney for Appellant.

Appeal allowed bond \$500.00.
Bond approved.

CARPENTER,
Judge.

11 Feb. 1921.

(Endorsed:) Filed Feb. 11-1921. John H. R. Jamar, Clerk.

(Endorsed:) In Bankruptcy. No. 21311. U. S. District Court Northern District of Illinois Eastern Division. In the Matter of O'Gara Coal Company, Bankrupt. Petition of Chicago Title & Trust Company, as receiver of La Salle Street Trust and Savings Bank for appeal. Hiram T. Gilbert, Attorney for Appellant.

And on to-wit: the 11th day of February, 1921, there was filed in the office of the Clerk of said Court a certain Assignment of Errors in words and figures following to-wit:

31 Filed Feb. 11, 1921.

United States Circuit Court of Appeals for the Seventh Circuit. October Term, A. D. 1921.

In the Matter of O'GARA COAL COMPANY, Bankrupt.

CHICAGO TITLE & TRUST COMPANY, as Receiver of the La Salle Street Trust & Savings Bank, Appellant,

vs.

FRANK G. GARDNER, as Trustee in Bankruptcy of O'Gara Coal Company, Appellee.

Appeal from District Court of the United States in and for the Northern District of Illinois.

Assignment of Errors.

And now comes the said Chicago Title & Trust Company, as receiver of the La Salle Street Trust & Savings Bank, appellant, by Hiram T. Gilbert, its attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to-wit:

1. The District Court erred in confirming the order of the referee Sidney C. Eastman, Esq., made and entered October 26th, 1920, requiring appellant, Chicago Title & Trust Company as receiver of the La Salle Street Trust & Savings Bank upon the payment to it by Frank G. Gardner, as trustee in bankruptcy of O'Gara Coal Company, bankrupt, of — Dollars, ($—), to deliver up to him as such trustee in bankruptcy, the promissory note in said order mentioned and described and the fifteen hundred (1500) shares of the capital stock of the Harrisburg-Saline Collieries Company in said order mentioned.

2. The District Court erred in confirming the finding of said referee Sidney C. Eastman and in holding that as a matter of law said Frank G. Gardner, as trustee in bankruptcy of said O'Gara Coal Company, bankrupt, was entitled to a set-off against the claim of said Chicago Title & Trust Company, as receiver of the La
32 Salle Street Trust & Savings Bank, the sum of Twelve Thousand Eight Hundred Ninety-four Dollars and Ninety-three Cents ($12,894.93) and that upon the payment by said Frank G.

ardner, as trustee in bankruptcy as aforesaid, to said Chicago Title Trust Company, as receiver of said La Salle Street Trust & Savings ank, of the balance which would be due upon the promissory note r $15,000 mentioned in said order after crediting thereon the vidend of $4963.35 paid on or about August 14, 1916 by the ceiver of said La Salle Street Trust & Savings Bank to the trustee bankruptcy of said O'Gara Coal Company, and the further divi-end of $1985.34 paid on June 19, 1918, by said receiver to said ustee in bankruptcy, said Frank G. Gardner, as trustee in bank-uptcy was entitled to the cancellation of said bankrupt's promissory ote and its delivery up to said Frank G. Gardner, as trustee in ankruptcy as aforesaid, together with the fifteen hundred (1500) hares of the capital stock of said Harrisburg-Saline Collieries Com-any pledged as collateral security for the payment of said promis-ory note for $15,000.

3. The District Court erred in finding that said Frank G. Gardner, s trustee in bankruptcy of said O'Gara Coal Company, was entitled o set off against the claim of said Chicago Title & Trust Company, s receiver of said La Salle Street Trust & Savings Bank, upon said promissory note for $15,000, the balance of the claim of the trustee f the O'Gara Coal Company, bankrupt, against said La Salle Street Trust & Savings Bank remaining after deducting therefrom the lividends paid by said receiver of said La Salle Street Trust & Sav-ngs Bank to said trustees in bankruptcy of said O'Gara Coal Com-pany.

4. The District Court erred in not finding that said Chicago Title & Trust Company, as receiver of said La Salle Street Trust & Sav-ngs Bank was not bound to deliver up to said Frank G. Gardner, as rustee in bankruptcy of said O'Gara Coal Company, said fifteen hun-lred (1500) shares of the capital stock of said Harrisburg-Saline Collieries Company, until the payment to said Chicago Title & Trust Company, as receiver of said La Salle Street Trust & Savings Bank, of the principal of said promissory note for $15,000, with interest thereon as provided by said promissory note.

5. The District Court erred in not reversing the order of said referee Sidney C. Eastman, Esq., made and entered on October 26, 1920.

33 6. The District Court erred in not allowing a claim in favor of said Chicago Title & Trust Company, as receiver of said La Salle Street Trust & Savings Bank, against said O'Gara Coal Company, bankrupt, for the principal of said promissory note of $15,000 and interest thereon from the date thereof and in requiring the payment of said claim by said Frank G. Gardner, as trustee in bankruptcy of said O'Gara Coal Company.

7. The District Court erred in denying the petition for review of said Chicago Title & Trust Company as receiver of the La Salle Street Trust & Savings Bank, appellant.

And the said Chicago Title & Trust Company, as receiver of said La Salle Street Trust & Savings Bank, appellant, prays that the said order of said District Court may be reversed with directions to said District Court to enter such order in lieu thereof as justice may require.

HIRAM T. GILBERT,
Attorney for Appellant.

(Endorsed:) Filed Feb. 11-1921. John H. R. Jamar, Clerk.

And on to-wit: the eleventh day of February, 1921, in the record of proceedings thereof in said entitled cause, before the Honorable George A. Carpenter, Judge, appears the following entry:

Order of Feb. 11, 1921.

In the District Court of the United States, Northern District of Illinois, Eastern Division.

Friday, February 11, A. D. 1921.

Present: Honorable George A. Carpenter, District Judge.

No. 21311.

In re O'Gara Coal Company, Bankrupt.

On motion of Chicago Title and Trust Company supported by its petition heretofore filed herein for an appeal to the United States Circuit Court of Appeals for the Seventh Circuit, it appearing
34 to the court that said petitioner has filed its assignment of errors together with its appeal bond in the sum of five hundred dollars, it is ordered that said appeal be and the same hereby is allowed.

And on to-wit: the eleventh day of February, 1921, came Chicago Title and Trust Company, as principal, and Abel Davis as surety and filed, in the office of the Clerk of said Court a certain Bond on Appeal in words and figures following to-wit:

Bond on Appeal.

Filed Feb. 11, 1921.

Know all men by these presents that we, Chicago Title and Trust Company, as receiver of the La Salle Street Trust & Savings Bank as principal, and Able Davis, as surety, are held and firmly bound unto Frank G. Gardner, as Trustee in Bankruptcy of O'Gara Coal Company, in the penal sum of $500.00 for the payment of which well and truly to be made we bind ourselves, our heirs, executors administrators, assigns and successors, jointly and severally, firmly by these presents.

Witness our hands and seals this 11th day of February, A. D. 1921.

The condition of the above obligation is such that whereas on the 3rd day of February, 1921, the District Court of the United States in and for the Eastern Division of the Northern District of Illinois did enter an order denying a petition of the above bounden Chicago Title & Trust Company, as Receiver of the La Salle Street Trust & Savings Bank, for the review of an order entered on October 26, 1920, by Sidney C. Eastman, Esq., Referee in Bankruptcy, in the case of O'Gara Coal Company, bankrupt, and confirming said order of said Referee, from which said order of said District Court the above bounden Chicago Title & Trust Company, as Receiver as aforesaid, has prayed for and obtained an appeal to the United States Circuit Court of Appeals for the Seventh Circuit: Now, therefore, if the said Chicago Title & Trust Company, as Receiver as aforesaid, shall duly prosecute its said appeal and shall pay all costs and damages awarded against it and otherwise comply with said order appealed from, in case the same shall be affirmed by said United
35 States Circuit Court of Appeals, then this obligation to be void, otherwise to remain in full force and effect.

[SEAL.] CHICAGO TITLE & TRUST COMPANY,
As Receiver of the La Salle Street Trust & Savings Bank,
By ABEL DAVIS, *V. P.* [SEAL.]
ABEL DAVIS. [SEAL.]

O. K.
FRANK G. GARDNER,
As Trustee in Bankruptcy of O'Gara Coal Co.

Approved.

CARPENTER,
Judge.

11 Feb., 1921.

(Endorsed:) Filed Feb. 11, 1921 John H. R. Jamar Clerk.

(Endorsed:) Bankruptcy No. 21311. United States District Court Northern District Eastern Division. In the Matter of O'Gara Coal Company, a Corp. Bankrupt. Appeal Bond on Appeal by Chicago Title & Trust Company, Receiver, from Order Denying Petition for Review.

And on to-wit: the 26th day of February, 1921, there was filed in the office of the Clerk of said Court a certain Praecipe and Stipulation in words and figures following to-wit:

36 Filed Feb. 26, 1921.

District Court of the United States, Northern District of Illinois, Eastern Division.

In Bankruptcy.

No. 21311.

In the Matter of O'GARA COAL COMPANY, Bankrupt.

CHICAGO TITLE & TRUST COMPANY, as Receiver of the La Salle Street Trust & Savings Bank, Appellant,

vs.

FRANK G. GARDNER, as Trustee in Bankruptcy of O'Gara Coal Company, Appellee.

In the Matter of the Petition for Review of CHICAGO TITLE & TRUST COMPANY, as Receiver of the La Salle Street Trust & Savings Bank.

Appeal to United States Circuit Court of Appeals for the Seventh Circuit.

To the clerk of said District Court:

You will please prepare a transcript of the record in the above entitled matter for the purposes of the appeal to the United States Circuit Court of Appeals, for the Seventh Circuit, which shall contain the following:

1. The petition filed November 3, 1920, by Chicago Title & Trust Company, as receiver of the La Salle Street Trust & Savings Bank, before Sidney C. Eastman, Esq., as Referee in Bankruptcy, praying for the review by said District Court of the order entered by said Sidney C. Eastman, on October 26, 1920, as certified to said District Court by said referee, together with the papers accompanying the same and certified by said referee.

2. The certificate of Sidney C. Eastman, referee, together with the papers accompanying the same and certified by said referee.

3. The order entered February 3, 1921, by said District Court confirming said order so made by said Sidney C. Eastman, Esq., referee in Bankruptcy, as aforesaid.

37 4. The assignment of errors filed in said court February 11, 1921, by said Chicago Title & Trust Company, as receiver of said La Salle Street Trust & Savings Bank.

5. The petition filed in said District Court February 3, 1921, by said Chicago Title & Trust Company, as receiver of the La Salle

reet Trust & Savings Bank for an appeal to the United States rcuit Court of Appeals for the Seventh Circuit, together with the der of the Judge of said District Court allowing said appeal.

6. The appeal bond filed February 11, 1921, in said District Court said Chicago Title & Trust Company, as receiver of the La Salle reet Trust & Savings Bank and the approval thereof by the judge said District Court.

7. The copy of this præcipe and stipulation.

Dated Chicago, Illinois, February 12, 1921.

CHICAGO TITLE & TRUST COMPANY,
As Receiver of the La Salle Street Trust & Savings Bank.
By HIRAM T. GILBERT,
Its Attorney.

Stipulation.

It is hereby stipulated by and between the parties as follows:

1. That the transcript of the record made up in accordance with he foregoing præcipe is sufficient to present to the United States ircuit Court of Appeals the questions presented by the appeal.

2. That the appellee Frank G. Gardner, as trustee in bankruptcy, f the O'Gara Coal Company, bankrupt, waives the issuance of the ervice of a citation in said appeal and will enter its appearance in aid Circuit Court of Appeals.

Dated Chicago, Illinois, February 12, 1921.

HIRAM T. GILBERT,
Attorney for Chicago Title & Trust Co., Receiver of the La Salle St. Tr. & Sav. Bk.
JUDAH WILLARD WOLF & R.,
Attorneys for Frank G. Gardner, Trustee in Bankruptcy of O'Gara Coal Company, Bankrupt.

(Endorsed:) Filed Feb. 26, 1921. John H. R. Jamar, Clerk.

38 *Certificate of Clerk.*

NORTHERN DISTRICT OF ILLINOIS,
Eastern Division, ss:

I, John H. R. Jamar, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with Præcipe filed in this Court in the cause entitled In the Matter of O'Gara Coal Company, Bankrupt, as the same appear from the original records and files thereof, now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in the City of Chicago, in said District, this 16th day of March A. D. 1921.

[SEAL.] JOHN H. R. JAMAR,
Clerk.

39 Filed Mar. 23, 1921.

United States Circuit Court of Appeals for the Seventh Circuit.

No. 2954.

In the Matter of O'GARA COAL COMPANY, Bankrupt.

CHICAGO TITLE & TRUST COMPANY, as Receiver of the La Salle Street Trust & Savings Bank, Appellant,

vs.

FRANK G. GARDNER, as Trustee of O'Gara Coal Company, Bankrupt, Appellee.

Appeal from District Court of United States, Eastern Division of Northern District of Illinois.

It is hereby stipulated by and between the parties that the above entitled cause be consolidated and heard with cause No. 2933 pending in this court entitled Chicago Title & Trust Company, as Receiver of the La Salle Street Trust & Savings Bank, petitioner, vs. Frank G. Gardner, as trustee in bankruptcy of O'Gara Coal Company, respondent, and that the record in the above entitled cause No. 2954 only need be printed.

Dated Chicago, Illinois, March 16, 1921.

HIRAM T. GILBERT,
Attorney for Appellant in Cause No. 2954 and for Petitioner in Cause No. 2933.
JUDAH WILLARD WOLF & RICHMANN,
Attorneys for Appellant in Cause No. 2954 and for Respondent in Cause No. 2933.

Endorsed: No. 2954. U. S. Circuit Court of Appeals. Seventh Circuit. In the Matter of O'Gara Coal Company, Bankrupt. Chicago Title & Trust Company, Receiver, etc., Appellant, vs. Frank G. Gardner, Trustee, etc. Appellee. Stipulation to Consolidate with No. 2933 and for Printing of Record No. 2954. Filed Mar. 23, 1921. Edward M. Holloway, Clerk.

40 *Order of Mar. 31, 1921.*

United States Circuit Court of Appeals for the Seventh Circuit.

No. 2954.

CHICAGO TITLE & TRUST COMPANY, as Receiver of the La Salle Street Trust & Savings Bank, Appellant,

vs.

FRANK G. GARDNER, as Trustee of O'Gara Coal Company, Bankrupt, Appellee.

Appeal from District Court of United States, Eastern Division, Northern District of Illinois.

This day, on motion of appellant, Chicago Title & Trust Company, as receiver of the La Salle Street Trust & Savings Bank, the appellee, Frank G. Gardner, as trustee of O'Gara Coal Company, bankrupt, consenting thereto, it is ordered that this cause be consolidated and heard with cause No. 2933, being Chicago Title & Trust Company, as receiver of the La Salle Street Trust & Savings Bank, petitioner, against Frank G. Gardner, as trustee in bankruptcy of O'Gara Coal Company, bankrupt, respondent, and that the record in this cause be printed and the printing of the record in cause No. 2933 be dispensed with.

Enter.

BAKER,
C. J.

3/31/21.

O. K.
HIRAM T. GILBERT,
For Appellant.
JUDAH W. W. & R.,
For Appellee.

Endorsed: No. 2954. In the U. S. Circuit Court of Appeals. Chicago Title & Trust Company as receiver, etc., Appellant, vs. Frank G. Gardner, as Trustee, etc., Appellee. Order for Consolidation Cause No. 2933.

Endorsed: United States Circuit Court of Appeals for the Seventh Circuit October Term 1920. No. 2954. In re O'Gara Coal Co. Bankrupt. Order Consolidating etc. Filed Mar. 31, 1921. Edward M. Holloway, Clerk.

41 & 42 United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing pages, numbered from 1 to 40, inclusive, contain a true copy of the printed record, printed under my supervision and filed July 2nd, 1921, on which the following entitled cause was heard and determined: In the Matter of O'Gara Coal Company, Bankrupt. Chicago Title & Trust Company, As Receiver of the La Salle Street Trust and Savings Bank, Appellant, vs. Frank G. Gardner, as Trustee in Bankruptcy of the O'Gara Coal Company, Appellee, No. 2954, October Term, 1920, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this thirteenth day of March, A. D. 1922.

[Seal United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

43 At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States Court room, in the city of Chicago, in said Seventh Circuit on the fifth day of October 1920, of the October term in the year of our Lord one thousand nine hundred and twenty and of our Independence the one hundred and forty-fifth.

And afterwards, to-wit: On the seventeenth day of March, 1921 in the October term last aforesaid, came the appellant, by its counsel, Mr. Hiram T. Gilbert, and filed in the office of the clerk of this court his appearance, which said appearance is in the words and figures following, to-wit:

United States Circuit Court of Appeals for the Seventh Circuit, October Term, 1920.

No. 2954.

In the Matter of O'GARA COAL Co., Bankrupt.

CHICAGO TITLE & TRUST Co., Receiver, Appellant,

vs.

FRANK G. GARDNER, as Trustee, Appellee.

The clerk will enter my appearance as counsel for the appellant.
HIRAM T. GILBERT.

[Endorsed:] Filed Mar. 17, 1921. Edward M. Holloway, Clerk.

And afterwards, to-wit: On the twenty-third day of March, 1921, n the October term last aforesaid, there was filed in the office of the lerk of this court a certain Stipulation in re printing record, etc., hich said Stipulation is not copied here as the same appears on age 39 of the printed record in this cause, certified herewith.

4 And afterwards, to-wit: On the thirty-first day of March, 1921, in the October term last aforesaid, the following further roceedings were had and entered of record, to wit:

Thursday, March 31, 1921.

Court met pursuant to adjournment.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Hon. George T. Page, Circuit Judge.
Edward M. Holloway, Clerk.

Before Hon. Francis E. Baker, Presiding Judge.

2954.

In the Matter of the O'GARA COAL COMPANY, Bankrupt.

CHICAGO TITLE & TRUST COMPANY, Receiver of the La Salle Stre
Trust & Savings Bank,

vs.

FRANK G. GARDNER, Trustee of the O'Gara Coal Company,
Bankrupt.

Appeal from the District Court of the United States for the Northe
District of Illinois, Eastern Division.

This day, on motion of appellant, Chicago Title & Trust Compar as receiver of the La Salle Street Trust & Savings Bank, the appell Frank G. Gardner, as trustee of O'Gara Coal Company, bankru consenting thereto, it is ordered that this cause be consolidated a heard with cause No. 2933, being Chicago Title & Trust Compar as receiver of the La Salle Street Trust & Savings Bank, petition against Frank G. Gardner, as trustee in bankruptcy of O'Gara C Company, bankrupt, respondent, and that the record in this ca be printed and the printing of the record in cause No. 2933 be d pensed with.

45 And afterwards, to-wit: On the twenty-sixth day of M 1921, in the October term last aforesaid, came the appell by his counsel, Mr. Henry M. Wolf, Mr. A. F. Reichmann and M Arthur M. Cox, and filed in the office of the clerk of this court th appearance, which said appearance is in the words and figures f lowing, to-wit:

United States Circuit Court of Appeals for the Seventh Circuit
October Term, 1920.

No. 2954.

In re O'GARA COAL COMPANY, Bankrupt.

CHICAGO TITLE & TRUST CO., as Receiver, etc., Appellant.

vs.

FRANK G. GARDNER, as Trustee, etc., Appellee.

The clerk will enter my appearance as counsel for the appellee.

HENRY M. WOLF.
A. F. REICHMANN.
ARTHUR M. COX.

1501 Corn Exchange Bk. Bld.
Tel. Franklin 205.

[Endorsed:] Filed May 26, 1921. Edward M. Holloway, Clerk.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States Court room, in the city of Chicago, in said Seventh Circuit, on the fourth day of October, 1921, of the October term in the year of our Lord one thousand nine hundred and twenty-one and of our Independence the one hundred and forty-sixth.

46 And afterwards, to-wit: On the fourth day of October, 1921, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

Tuesday, October 4, 1921.

Court opened by proclamation of crier.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Hon. George T. Page, Circuit Judge.
Edward M. Holloway, Clerk.
John J. Bradley, Marshal.

Before Hon. Francis E. Baker, Circuit Judge; Hon. Samuel Alschuler, Circuit Judge; Hon. Evan A. Evans, Circuit Judge.

2954.

In the Matter of O'Gara Coal Co., Bankrupt.

Chicago Title & Trust Co., as Receiver, etc.,

vs.

Frank G. Gardner, as Trustee, etc.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Divisiön.

It is ordered by the court that this cause be, and the same is hereby set down for hearing on October 12, 1921.

And afterwards, to-wit: On the twelfth day of October, 1921, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

47 Wednesday, October 12, 1921.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Hon. George T. Page, Circuit Judge.
Edward M. Holloway, Clerk.
John J. Bradley, Marshal.

Before Hon. Francis E. Baker, Circuit Judge; Hon. Samuel Alschuler, Circuit Judge; Hon. Evan A. Evans, Circuit Judge.

2954.

In the Matter of O'Gara Coal Co., Bankrupt.

Chicago Title & Trust Co., as Receiver, etc.,

vs.

Frank G. Gardner, as Trustee, etc.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel and on oral arguments by Mr. Hiram T. Gilbert, counsel for appellant and by Mr. A. F. Reichmann, counsel for appellee, and the court having heard the same takes this matter under advisement.

And afterwards, to-wit: On the third day of January, 1922, in the October term last aforesaid, there was filed in the office of the clerk of this court the Opinion of the court, which said Opinion is in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Seventh Circuit, October Term and Session, 1921.

Nos. 2933, 2954.

In the Matter of O'GARA COAL COMPANY, Bankrupt.

ICAGO TITLE & TRUST COMPANY, as Receiver of the La Salle Street Trust & Savings Bank, Appellant,

vs.

RANK G. GARDNER, as Trustee in Bankruptcy of the O'Gara Coal Company, Appellee.

ppeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Before Baker, Alschuler, and Evans, Cir. JJ.

In 1913 O'Gara Coal Company became bankrupt. It owed the a Salle Street Trust & Savings Bank a note for $15,000. Trustees f bankrupt deposited funds of the estate in this bank, which was an uthorized depository of the district court. June, 1913, the bank ecame insolvent and suspended business, and a receiver was ap- ointed in the state court. On suspension of the bank the deposit f the trustee was almost $20,000. The state court appointed a re- eiver for the bank who, in September, 1914, exhibited in the bank- uptcy court proof of unsecured claim against the bankrupt based on aid note due the bank, which was allowed in full. June, 1916, rustees in bankruptcy filed in the state court claim for the amount f such deposits and demanding priority for the claim. Afterwards he demand for priority was abandoned, and claim allowed in full s a general claim. In the liquidation of the assets of the bank its eceiver has paid creditors two dividends, the trustee in bankruptcy being paid as such dividends on its claim allowed against the
49 bank for the deposits, August, 1916, $4,963.35, and June, 1918, $1,985.34. May 22, 1918, trustee in bankruptcy filed its petition in the bankruptcy court setting forth the facts sub- stantially as above stated, and alleging that by section 68 of the Bank- ruptcy Act the trustee is entitled to set off against the claim of the receiver of the bank the amount which is due to the bankrupt estate from the bank as aforesaid, praying for decree setting off such claims, and that upon payment of balance, if any, which may then be due on such note, certain collateral which accompanied said note may be ordered to be surrendered by the receiver of the bank. October, 1920, the referee entered an order granting the prayer of the petition for set-off and decreeing accordingly, and February, 1921, the dis- trict court confirmed such order and decree. The matter is brought here both by appeal and petition to review and revise.

Opinion by Alschuler, Cir. J.

Only questions of law are involved which we will dispose of without determining the question of appellate procedure. The primary and controlling question is, was there at the time the bank suspended a right of set off as between these demands? Section 68 provides that "in all cases of mutual debts or mutual credits between the estate of the bankrupt and the creditor the account shall be stated and one debt set off against the other and the balance only shall be allowed or paid." We are met upon the threshold with the condition that the deposits were not made by the bankrupt which, but for the bankruptcy, would presumably have had the right to determine whether or not it would select as its depository the bank to which it was at the same time indebted, and which it knew had a right to apply the deposit upon any debt due the bank. The deposit here was made by the trustee in bankruptcy, an officer of the court, in a bank which was by the court and under the law designated as a depository for funds of bankrupt estates; not of this bankrupt alone but of any bankrupt. Indeed under the pleadings here it does not appear that at the time these deposits were made the trustee in bankruptcy was aware that the bank held any such claim against the bankrupt, for it appears that only after the bank suspended was the claim of the bank exhibited in the O'Gara bankruptcy proceedings. This fact may not in strictness affect the question of the right of setoff,
50 but it serves to show the doubtless unintended result which might flow from holding the bank and trustee in bankruptcy to be in such relation toward each other that the respective claims might be considered "mutual debts."

The relation between a bank and its patron under which the latter borrows from the bank and carries there a checking account, of itself suggests that mutuality which is a proper subject for the setoff of contra debts. The depository here is but the agent of the court, or more directly of the officer of the court in the holding of the funds which the court controls. If it chanced that a bankrupt was personally indebted to a receiver or a trustee of an estate, could the trustee apply the funds coming into his hands in this capacity upon a debt personally owed the trustee by the bankrupt? The question answers itself. So if the trustee, instead of himself holding the money, constitutes some bank his agent or depository for the purpose of safely keeping it, there is not thereby constituted between them that legal or equitable mutuality which would enable the claims to be set off.

While here it is the depositor who is undertaking to have the claims set off as mutual debts, in order to succeed the mutuality must be such that at the time of the insolvency they may be the subject of setoff. In this case it would be the time of the suspension of the bank. If at that time each debtor had not a right of setoff against the other, neither had such right. But it is hardly conceivable that prior to the suspension of the bank it was within its right and power to have applied the deposit made by the trustee in bankruptcy upon

e bank's claim against the bankrupt. If a bank had the right so do, no legal representative of a bankrupt estate could safely deposit nds of the estate in any bank, for it may be that without the owledge of the depositor, the bank may hold a claim against the nkrupt, by virtue of which the bank could appropriate the deposit d apply it upon the bank's claim, to the detriment of other editors of the bankrupt. Such legal representative, if so minded, ight deliberately deposit with a creditor bank the funds of the estate ith the very purpose of putting it in the bank's power to appropriate ch funds upon the claim of the bank, and thus under sanction of e law prefer the bank. It seems too plain for argument that this annot properly be done. If prior to the suspension of the bank it uld not properly have seized upon and applied the trustee's deposit, could not properly be done by the bank's trustee after the suspension.

1 The fact that this bank was a depository which under the law of the court had designated as such also militates against e proposition of mutuality of debt. To the extent that legally uthorized depositories are less than the whole number of banks, the hoice of the trustee is narrowed to such banks as have been duly uthorized. Had there been but one the trustee would have only Hobson's choice." Surely it could not have been intended that in imiting the number of depositories in which such funds may be laced there be incurred even remotely the risk of the lawful appro-riation of funds to which normally all creditors are entitled, to the laim of one creditor whose legal or equitable standing was not dif-erent from the others, save only in the fortuitous circumstance that he court's officer happened to deposit there funds of the bankrupt state.

The right to setoff of the bankrupt estate as against the insolvent ank and its creditors, is not different from the right of setoff of he insolvent bank as against the bankrupt and its creditors. There re not here such "mutual debts" as in law or in equity may prop-rly be set off.

In re United Grocery Co. 253 Fed. 267, considers a situation quite dentical with that here, and reaches the same conclusion as above ndicated. The main reliance in support of the decree is the case of People v. California Safe Deposit & Trust Co. 168 Cal. 261. While n some respects that case may be distinguished, there is much in it which if followed here would justify this decree. In this respect, however, we are not in accord with its holding.

We find that claim of the receiver of the bank and that of the trustee in bankruptcy were not properly the subject of setoff, and direct that the order or decree entered in the district court be set aside, and that the petition to set off the claims be dismissed.

A True Copy.

Teste:

—— ——,

Clerk of the United States Circuit Court
of Appeals for the Seventh Circuit.

52 And afterwards, on the same day, to-wit: On the third day of January, 1922, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

Tuesday, January 3, 1922.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Hon. George T. Page, Circuit Judge.
Hon. Claude Z. Luse, District Judge.
Edward M. Holloway, Clerk.
Robert R. Levy, Marshal.

Before Hon. Francis E. Baker, Circuit Judge; Hon. Samuel Alschuler, Circuit Judge; Hon. Evan A. Evans, Circuit Judge.

2954.

In the Matter of O'Gara Coal Company, Bankrupt.

Chicago Title & Trust Company, as Receiver of the La Salle Street Trust & Savings Bank,

vs.

Frank G. Gardner, as Trustee in Bankruptcy of the O'Gara Coal Company.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, It is now here ordered, adjudged and decreed by this court that this cause be, and the same is hereby remanded to the said District Court with direction to set aside the order or decree of the said District Court appealed from; and it is further ordered that the petition to set off the claims be dismissed.

53 & 54 And it is further ordered that the costs on this appeal be taxed against the appellee.

And afterwards, to-wit: On the second day of March, 1922, in the October term last aforesaid, there was filed in the office of the clerk of this court a certain Præcipe for transcript of record, which said Præcipe is in the words and figures following, to-wit:

Nos. 2933 & 2954.

In re O'GARA COAL CO.

Consolidated Appeal & Petition to Review & Revise.

o Hon. Edward M. Holloway, clerk U. S. Circuit Court of Appeals:

Please prepare and print the following record for the Supreme ourt of the United States for certiorari:

1. Complete transcript of record of No. 2954.

2. Proceedings in this court in No. 2954.

3. Petition to review & revise in No. 2933 (except the exhibits hereto; said exhibits being shown in the record of No. 2954 on apeal).

4. Proceedings in this court in No. 2933.

HENRY M. WOLF.
A. F. REICHMANN.
ARTHUR M. COX.

Endorsed: Filed Mar. 2, 1922. Edward M. Holloway, Clerk.

5 & 56 United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Halloway, Clerk of the United States Circuit Court f Appeals for the Seventh Circuit, do hereby certify that the foreoing pages, numbered from 43 to 53, inclusive, contain a true copy f the proceedings had and papers filed (except the briefs of counsel nd stipulation relating thereto) as called for in the Præcipe filed on larch 2nd, 1922, in the following entitled cause: In the Mater of O'Gara Coal Company, bankrupt. Chicago Title & Trust ompany, as Receiver of the La Salle Street Trust and Savings Bank, Appellant, vs. Frank G. Gardner, as Trustee in Bankruptcy f the O'Gara Coal Company, Appellee, No. 2954, October Term, 20, s the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the eal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this thirteenth day of March, A. D. 1922.

[Seal of United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

57 At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States Court room, in the city of Chicago, in said Seventh Circuit on the fifth day of October 1920, of the October term in the year of our Lord one thousand nine hundred and twenty and of our Independence the one hundred and forty-fifth.

And afterwards, to-wit: On the eleventh day of February, 1921, in the October term aforesaid, there was filed in the office of the clerk of this court a certain Petition to Review and Revise, which said Petition is in the words and figures following-to-wit:

In the United States Circuit Court of Appeals for the Seventh Circuit. —— Term, A. D. 1921.

No. 2933.

In the Matter of O'Gara Coal Company, Bankrupt.

Frank G. Gardner, Trustee in Bankruptcy of the Estate of O'Gara Coal Company, Bankrupt,

vs.

Chicago Title & Trust Company, as Receiver of the La Salle Street Trust & Savings Bank.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

To the Honorable the Judges of the Circuit Court of Appeals of the United States for the Seventh Circuit:

Your petitioner, Chicago Title & Trust Company, a corporation, as receiver of the La Salle Street Trust & Savings Bank, brings this its petition, against Frank G. Gardner, as trustee in bankruptcy, of O'Gara Coal Company, a corporation, and thereupon your petitioner says:

1. On the 26th day of October, A. D. 1921, Sidney C. Eastman Esq. referee in bankruptcy of the District Court of the United States, in and for the Eastern Division of the Northern District of Illinois, in the matter of O'Gara Coal Company, a corporation, bankrupt, on the application of Frank G. Gardner, trustee in bankruptcy, of said bankrupt, entered an order that said Frank G. Gardner, as trustee in bankruptcy as aforesaid, pay to petitioner, Chicago Title & Trust Company, as receiver of the La Salle Street Trust & Savings Bank, the sum of — Dollars, ($—), as the amount due and owing upon a promissory note of Fifteen Thousand Dollars ($15,000), held by petitioner and made by said O'Gara Coal Company on or about September 6th, A. D. 1913, after allowing thereon as set-off the sum of Twelve Thousand Eight hundred ninety-four Dollars and Ninety-three Cents ($12,894.93) and that upon said payment being made the liability of said bankrupt upon said note be extinguished and that petitioner, Chicago Title & Trust Company, as receiver of said La

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Salle Street Trust & Savings Bank, should deliver to said Frank G. Gardner, as trustee in bankruptcy, as aforesaid, the said promissory note duly cancelled and surrender to said Frank G. Gardner, as trustee in bankruptcy as aforesaid, fifteen hundred (1,500) shares of the capital stock of the Harrisburg-Saline Colleries Company then held by petitioner, as receiver of said La Salle Street Trust & Savings Bank, as security for said promissory note and that upon the payment in said order provided to be made by said Frank G. Gardner, as trustee in bankruptcy as aforesaid, to petitioner, Chicago Title & Trust Company as receiver of said La Salle Street Trust & Savings Bank, and the cancellation and surrender of said note and the surrender of said collateral, the claims of petitioner therein filed and identified as numbers 222 and 267 respectively, stand as satisfied in full in the records of said bankrupt estate in said District Court and that the claim of said Frank G. Gardner, as trustee in bankruptcy, of said O'Gara Coal Company against said La Salle Street Trust & Savings Bank should be deemed paid and satisfied.

2. On November 3, A. D. 1920, petitioner filed before said Sidney C. Eastman, as referee in bankruptcy as aforesaid, his petition praying that said above mentioned order might be reviewed as provided in the Bankruptcy act of 1898, General Order XXVII, which petition said Sidney C. Eastman, as referee in bankruptcy as aforesaid, duly certified to said District Court.

3. On February 3, A. D. 1921, said District Court entered an order confirming said order so made by said Sidney C. Eastman, referee in bankruptcy as aforesaid.

59 4. Said order and the judgment of said District Court confirming the same were and are erroneous and void in that said order and said judgment were and are contrary to the evidence and to the facts deciphered in said order and contrary to the law applicable to the evidence and the said facts and that said order was and is in fact a nullity and that the same should have not been confirmed by said District Court but on the contrary should have been revised and set aside.

5. A certified transcript of the proceeding of said District Court in said matter is hereunto annexed and is made a part of this petition.

Wherefore your petitioner feeling itself aggrieved by the said order and judgment confirming the same prays that the same may be revised in matters of law by your honorable court as provided by the Bankruptcy Act and the rules of practice in such case made and provided.

CHICAGO TITLE & TRUST COMPANY,
Receiver of the La Salle Street Trust and Savings Bank.

HIRAM T. GILBERT,
Attorney for Petitioner.

——, ——,
Attorney for Petitioner.

STATE OF ILLINOIS,
Cook County, ss:

Abel Davis being first duly sworn on his oath deposes and says that he is vice-president of Chicago Title & Trust Company, receiver of the La Salle Street Trust & Savings Bank, the petitioner in the foregoing petition, that he has read the said petition and knows the contents thereof and that the matters and things therein alleged are true to the best of his knowledge, information and belief.

ABEL DAVIS.

Subscribed and sworn to before me this 9th day of February, A. D. 1921.

[SEAL.] IRENE J. BLISS,
Notary Public.

Endorsed: Filed February 11, 1921. Edward M. Holloway, Clerk.

60 And afterwards, to-wit: On the thirty-first day of March, 1921, in the October term aforesaid, the following further proceedings were had and entered of record, to-wit:

Thursday, March 31, 1921.

Court met pursuant to adjournment.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Hon. George T. Page, Circuit Judge.
Edward M. Holloway, Clerk.

Before Hon. Francis E. Baker, Presiding Judge.

2933.

In the Matter of the O'GARA COAL COMPANY, Bankrupt.

CHICAGO TITLE & TRUST COMPANY, Receiver of the La Salle Street Trust & Savings Bank,

vs.

FRANK G. GARDNER, Trustee of the O'Gara Coal Company Bankrupt.

Original Petition to Review and Revise an Order of the District Court of the United States for the Northern District of Illinois, Eastern Division.

This day on motion of the petitioner, Chicago, Title & Trust Company, as receiver of the La Salle Street Trust & Savings Bank

e respondent, Frank G. Gardner, as Trustee of O'Gara Coal Comny, bankrupt, consenting thereto, it is ordered that this cause be nsolidated and heard with cause No. 2954, being Chicago Title Trust Company, as receiver of the La Sallet Street Trust & Savings nk, appellant, against Frank G. Gardner, as trustee in bankruptcy O'Gara Coal Company, bankrupt, appellee, and that the record in id cause No. 2954 be printed and the printing of the record in is cause be dispensed with.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the nited States Court room, in the city of Chicago, in said Seventh rcuit on the fourth day of October 1921, of the October term in e year of our Lord one thousand nine hundred and twenty-one d of our Independence the one hundred and forty-sixth.

And afterwards, to-wit: On the fourth day of October, 1921, in e October term last aforesaid, the following further proceedings ere had and entered of record, to-wit:

Tuesday, October 4, 1921.

Court opened by proclamation of crier.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Hon. Geodge T. Page, Circuit Judge.
Edward M. Holloway, Clerk.
John J. Bradley, Marshal.

efore Hon. Francis E. Baker, Circuit Judge; Hon. Samuel Alschuler, Circuit Judge; Hon. Evan A. Evans, Circuit Judge.

2933.

In the Matter of O'Gara Coal Co., Bankrupt.

Chicago Title & Trust Co., as Receiver, etc.,

vs.

Frank G. Gardner, as Trustee, etc.

riginal Petition to Review and Revise an Order of the District Court of the United States for the Northern District of Illinois, Eastern Division.

It is ordered by the court that this cause be, and the same is hereby et down for hearing on October 12, 1921.

62 And afterwards, to-wit: On the twelfth day of Octob 1921, in the October term last aforesaid, the following furth proceedings were had and entered of record, to-wit:

Wednesday, October 12, 1921.

Court met pursuant to adjournment and was opened by procl mation of crier.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Hon. George T. Page, Circuit Judge.
Edward M. Holloway, Clerk.
John J. Bradley, Marshal.

Before Hon. Francis E. Baker, Circuit Judge; Hon Samuel Alschu ler, Circuit Judge; Hon. Evan A. Evans, Circuit Judge.

2933.

In the Matter of O'Gara Coal Co., Bankrupt.

Chicago Title & Trust Co., as Receiver, etc.,

vs.

Frank G. Gardner, as Trustee, etc.

Original Petition to Review and Revise an Order of the District Cour of the United States for the Northern District of Illinois, Eastern Division.

Now this day come the parties by their counsel and this cau now comes on to be heard on the printed record and briefs of coun sel and on oral arguments by Mr. Hiram T. Gilbert, counsel for petitioner, and by Mr. A. F. Reichmann, counsel for respondent and the court having heard the same takes this matter under advise ment.

And afterwards, to-wit: On the third day of January, 1922, in the October term last aforesaid, there was filed in the office of the clerk of this court, the Opinion of the court, which said Opinion is not copied here, as the same appears in the transcript of record in cause No. 2954, In the Matter of O'Gara Coal Company, Bankrupt, certified herewith.

63 And afterwards, on the same day, to-wit: On the third day of January, 1922, in the October term last aforesaid, the fol lowing further proceedings were had and entered of record, to-wit:

Tuesday, January 3, 1922.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Hon. George T. Page, Circuit Judge.
Hon. Claude Z. Luse, District Judge.
Edward M. Holloway, Clerk.
Robert R. Levy, Marshal.

Before Hon. Francis E. Baker, Circuit Judge; Hon. Samuel Alschuler, Circuit Judge; Hon. Evan A. Evans, Circuit Judge.

2933.

In the Matter of O'Gara Coal Company, Bankrupt.

Chicago Title & Trust Company, as Receiver of the La Salle Street Trust & Savings Bank,

vs.

Frank G. Gardner, as Trustee in Bankruptcy of the O'Gara Coal Company.

Original Petition to Review and Revise an Order of the District Court of the United States for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the petition to review and revise an order of the District Court of the United States for the Northern District of Illinois, Eastern Division, entered thereon on February 3, 1921, and the answer thereto, and was argued by counsel.

On consideration whereof, It is now here ordered, adjudged
64 and decreed by this court that the said order of the said District Court be, and the same is hereby set aside and that the petition to set off the claims be dismissed.

And it is further ordered that the costs on this petition to review and revise be taxed against the respondent.

And afterwards, to-wit: On the second day of March, 1922, in the October term last aforesaid, there was filed in the office of the clerk of this court a certain Præcipe for Record, which said Præcipe is not copied here, as the same appears in the transcript of record in cause No. 2954, certified herewith.

65 United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing pages, numbered from 57 to 64, inclusive, contain a true copy of the proceedings had and papers filed (except the Opinion of the court, which appears in the transcript of record in cause No. 2954, certified herewith, the Præcipe for record, which also appears in the transcript of record in cause No. 2954, certified herewith, and the briefs of counsel) as called for in the Præcipe for Record filed March 2nd, 1922, in the following entitled cause: In the Matter of O'Gara Coal Company, Bankrupt. Chicago Title & Trust Company, as Receiver of the La Salle Street Trust & Savings Bank, Petitioner, vs. Frank G. Gardner, as Trustee in Bankruptcy of the O'Gara Coal Company, Respondent, No. 2933, October Term, 1920, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this thirteenth day of March, A. D. 1922.

[Seal of the United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

66 In the Supreme Court of the United States.

FRANK G. GARDNER, as Trustee in Bankruptcy of the O'Gara Coal Co., Petitioner,

vs.

CHICAGO TITLE & TRUST CO., as Receiver of the La Salle St. Trust & Savings Bank.

Assignments of Error.

I. The Circuit Court of Appeals erred in remanding this cause to the District Court with directions to set aside the order or decree of the District Court appealed from.

II. The Circuit Court of Appeals erred in ordering that the petition to set off the claims be dismissed.

III. The Circuit Court of Appeals erred in entering the order on the petition to review and revise, setting aside the order of the District Court and directing that the petition to set off the claims be dismissed.

IV. The Circuit Court of Appeals erred in ordering the costs on the appeal to be taxed against the appellee.

V. The Circuit Court of Appeals erred in ordering that the costs on the petition to review and revise be taxed against the respondent.

HENRY M. WOLF,
A. F. REICHMANN,
ARTHUR M. COX,
Counsel for Petitioner.

67 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Seventh Circuit, Greeting:

Being informed that there is now pending before you a suit in which Chicago Title & Trust Company, as Receiver of the La Salle Street Trust & Savings Bank, is appellant, and Frank G. Gardner, as Trustee in Bankruptcy of the O'Gara Coal Company, is appellee, Nos. 2933, 2954, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Northern District of Illinois, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United
68 States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-ninth day of April, in the year of our Lord one thousand nine hundred and twenty-two.

WM. R. STANSBURY,
Clerk of the Supreme Court of the United States.

In the United States Circuit Court of Appeals for the Seventh Circuit, October Term and Session, A. D. 1921.

In the Matter of O'GARA COAL COMPANY, Bankrupt.

CHICAGO TITLE & TRUST COMPANY, as Receiver of the La Salle Street Trust and Savings Bank, Appellant,

vs.

FRANK G. GARDNER, as Trustee in Bankruptcy of the O'Gara Coal Company, Appellee.

Consolidated Causes.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

It is hereby stipulated that the record in the above causes Numbers 2933 and 2954 (which were heretofore consolidated by an order duly entered in this court on March 31, 1921) already filed in the Supreme Court of the United States in the matter of the Petition of Frank G. Gardner, as Trustee in Bankruptcy of the O'Gara Coal Company vs. Chicago Title and Trust Company, as Receiver of the La Salle Street Trust and Savings Bank, Number 846 of the October Term, A. D. 1921, shall stand as a return to the Writ of Certiorari issued by the Supreme Court of the United States on the twenty-ninth day of April, A. D. 1922.

Dated May 6, 1922.

HENRY M. WOLF,
A. F. REICHMANN,
ARTHUR M. COX,
Counsel for Frank G. Gardner, as Trustee in Bankruptcy of the O'Gara Coal Company.
HIRAM T. GILBERT,
Counsel for Chicago Title & Trust Company, as Receiver of the La Salle Street Trust and Savings Bank.

Endorsed: Filed May 9, 1922. Edward M. Holloway, Clerk.

UNITED STATES OF AMERICA,
Seventh Circuit, ss:

In obedience to the command of the foregoing writ of certiorari and in pursuance of the stipulation of the parties, a full copy of which is hereto attached, I do hereby certify and return that the transcript of the record filed with the application to the
69 & 70 Supreme Court of the United States for a writ of certiorari in the cases of Chicago Title & Trust Company, as Receiver

of the La Salle Street Trust & Savings Bank, appellant, vs. Frank G. Gardner, as Trustee in Bankruptcy of the O'Gara Coal Company, appellee, Nos. 2933 and 2954, is a full, true and complete transcript of the record upon which said causes were heard in the United States Circuit Court of Appeals for the Seventh Circuit, together with all proceedings in said court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit at the City of Chicago this eleventh day of May, A. D. 1922.

[Seal of the United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

[Endorsed:] File No. 28801. Supreme Court of the United States, October Term, 1921. No. 846. Frank G. Gardner, as Trustee in Bankruptcy, etc., vs. Chicago Title & Trust Company, as Receiver, etc. Writ of certiorari. Filed May 9, 1922. Edward M. Holloway, Clerk.

71 [Endorsed:] File No. 28801. Supreme Court U. S., October Term, 1921. Term No. 317. Frank G. Gardner, as Trustee in Bankruptcy, etc., Petitioner, vs. Chicago Title & Trust Company, as Receiver, etc. Writ of certiorari and return. Filed May 13, 1922.

No. 317.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1922.

FRANK G. GARDNER, as Trustee in Bankruptcy of the O'GARA COAL COMPANY,

Petitioner.

vs.

CHICAGO TITLE AND TRUST COMPANY, as Receiver of the LaSalle Street Trust and Savings Bank,

Respondent.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Reply Brief and Argument for Petitioner.

HENRY M. WOLF,
A. F. REICHMANN,
ARTHUR M. COX,
Counsel for Petitioner.

BARNARD & MILLER PRINT, CHICAGO.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1922.

No. 317.

FRANK G. GARDNER, as Trustee in Bankruptcy of the O'GARA COAL COMPANY,
Petitioner,

vs.

CHICAGO TITLE AND TRUST COMPANY, as Receiver of the LaSalle Street Trust and Savings Bank,
Respondent.

Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

REPLY BRIEF AND ARGUMENT FOR PETITIONER.

I.

THE RELATION OF THE DEPOSITORY TO THE TRUSTEES WAS NOT SUBMITTED TO AND DECIDED BY THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS.

THIS MATTER HAS NOT BECOME RES ADJUDICATA.

THE TRUSTEE IN BANKRUTCY IS NOT ESTOPPED FROM CLAIMING HIS RIGHT OF SET-OFF HEREIN.

In the respondent's brief it is said (p. 8) that the relation of the depository to the trustee is not a fiduciary one, but is simply that of debtor and creditor, *and that this*

point was submitted to and decided by the Circuit Court of Cook County when it passed on the petition of the Trustees in Bankruptcy for the allowance of a preferred claim against the insolvent bank; and it is further contended that "it allowed the claim as a general claim."

Upon this premise counsel for the respondent argues that the State Circuit Court has already held, (a) that these deposits by Trustees in Bankruptcy in the designated Depository created simply the relation of debtor and creditor; (b) that the Circuit Court of Cook County, Illinois, has so adjudged in the proceedings for the administration of the estate of the insolvent depository; (c) that the petitioner herein, as Trustee in Bankruptcy, is estopped from claiming any rights in this proceeding because the predecessor trustees filed a claim in the receivership proceedings in the Circuit Court of Cook County, Illinois, and because it was allowed as a general claim. These contentions we now propose to answer.

It appears from the record herein that on June 5, 1916, the Trustees in Bankruptcy filed in the Circuit Court of Cook County, Illinois, a petition alleging deposits by the trustees, in the La Salle Street Trust and Savings Bank, prior to its suspension, amounting to $19,843.62 and praying the Circuit Court to allow in favor of said trustees and against the La Salle Street Trust and Savings Bank *a preferred claim to the amount of* $19,843.62 *and to adjudge that it was entitled to priority of payment out of the assets in the possession of the respondent as receiver, in advance of the general unsecured creditors.* (Rec., 6, 7.)

On June 30, 1916, *William C. Niblack became the sole Trustee in Bankruptcy of the bankrupt estate,* and continued to act as such up to the time of his death, on the 6th day of June, 1920. (Rec., 4.)

In August, 1916, the petition for priority and preference of payment of the trustee's claim out of the assets of the insolvent depository WAS ABANDONED BY SAID William C. Niblack, Trustee in Bankruptcy, so far as it prayed for the allowance of a *preferred* claim, and the claim was thereupon allowed as a general claim. (Rec., 7.)

The statement in the respondent's brief that this point (the relation of a depository to the trustees of a bankrupt estate, etc.), was submitted to and decided by the Circuit Court of Cook County when it passed upon the petition of the Trustees in Bankruptcy for the allowance of a preferred claim against the insolvent bank is not justified by anything in the record, and is incorrect.

It appears from the record in this case that after William C. Niblack became sole Trustee in Bankruptcy of the bankrupt estate of the O'Gara Coal Company he *abandned the claim for preference* and permitted it to be allowed as a general claim. There is nothing in the record to show that any question was submitted to or decided by the Circuit Court of Cook County, or that there was any hearing upon the claim of any character at the time the *pro forma* order was entered allowing it as a general claim.

The first question that arises is, could William C. Niblack, as Trustee in Bankruptcy of the O'Gara Coal Company, by abandoning the petition for preference and priority of payment out of the assets of the insolvent depository in the Circuit Court of Cook County, Illinois, *create an estoppel in favor of himself as receiver of the insolvent depository?*

As pointed out by the respondent's counsel in his brief (p. 22),

> "William C. Niblack occupied a dual position, being not only the receiver of the bank, but being also a trustee of the bankrupt estate. It is plain, therefore,

that the bankrupt estate would not in any event be in a position to claim any advantage from an act of Niblack as receiver which it would not have if he had not performed that act. In other words, Niblack as trustee of the bankrupt estate was not in a position to assert any right against the creditors of the Trust and Savings Bank because of an act performed by him as receiver of the bank."

And again, counsel says in his brief (p. 24):

"We venture to assert that law libraries may be searched in vain for a precedent authorizing one who happens to be a trustee of two distinct estates to take a voluntary step by which one estate is given, as against the other estate, a right which, but for such step, it would not possess."

In the face of these statements by counsel for the respondent in his brief, we are unable to understand how he can argue that the trustee of this bankrupt estate is estopped from claiming any right of set-off because William C. Niblack, *while acting as sole trustee of the bankrupt estate*, abandoned a petition which had theretofore been filed by the Trustees in Bankruptcy claiming priority and preference, and permitted his claim to be allowed as a general claim against the insolvent estate of the depository.

Counsel's argument that William C. Niblack as trustee cannot take advantage of the acts of William C. Niblack as receiver as the basis for a claim of estoppel against the Receiver necessarily admits the converse that William C. Niblack as Receiver cannot take advantage of the acts of William C. Niblack as Trustee as the basis for a claim of an estoppel.

This court will, we think, assume from the record in this case that the decisions of the state courts in Illinois would not have warranted the Circuit Court of Cook County, Illinois, in granting a preference or priority to

he claim filed by the Trustees in Bankruptcy of the O'Gara Coal Company. The Circuit Court of Cook County, Illinois, in administering the assets of an insolvent bank organized under state law, might feel itself justified in refusing a preference to a claim of this character because of the absence of any provision in the State Banking Act authorizing it, or because of the doctrine as to trust funds laid down by the Illinois Supreme Court.

It does not follow, by any means, that because the Circuit Court of Cook County, in the administration of an insolvent bank organized under State Banking Act in Illinois, ~~did~~ not feel justified in granting a preference and priority to the trustees on their claim, that the Federal Court, when it acquired jurisdiction of the matter upon a claim filed by the receiver of the insolvent depository, would find itself handicapped either by the State Banking Law or by the decisions of the state courts as to the trust fund doctrine. Swift vs. Tyson

It appears from the record that a year after William C. Niblack as trustee had abandoned his claim for priority and preference in the receivership proceedings in the Circuit Court of Cook County, that William C. Niblack as receiver of the insolvent depository came into the District Court of the United States and filed (on August 21, 1917), an amended proof of claim. We have a situation in which the insolvent depository happens to be a state bank organized under state law, and when it becomes insolvent is administered by a state court, in accordance with the provisions of the State Banking Law and the decisions of the State Supreme Court. But this bank has seen fit to accept an appointment *as a Federal Depository.* It has voluntarily assumed to act as a depository of court funds committed to its care *by a Federal court.* This appointment is provided for *by an Act of Congress of the United States,* and is

entirely outside of any provision of the State Banking Law. We submit that if a state bank is to be permitted to act as a federal depository, or as a depository of court funds committed to its care by a Federal Court, it must and does accept the appointment *cum onere.*

It accepts the appointment with all the responsibilities and liabilities that a national bank would have if it was appointed depository. It cannot be possible that Congress contemplated there should be any different kind of liability of a depository of court funds of a *Federal Court* if the depository was a national bank than if the depository happens to be a state bank.

Therefore, at the threshold, the question arises whether the Federal Court which has entrusted to the Depository court funds which are *in custodia legis* deposited in the duly designated Depository by its own court officer, is obliged to stand by with its hands tied by decisions of a state court administering the assets of the depository under state law.

. When a Federal Court is dealing with its own depository, and is considering whether or not funds *in custodia legis* deposited in a duly designated depository are to be treated as trust funds, or whether such deposits merely create the relation of debtor and creditor, surely the Federal Court is not to consider its hands tied by any state statute or rule of the state courts. The Federal Court will, we think, without any hesitation, determine that question for itself. No court could preserve its self-respect and at the same time delegate to another court having a different jurisdiction and governed by different rules the authority to determine the relations between that court and its own fiduciary or depository of funds entrusted to it by the court itself. Clearly, these are matters for the Federal Court itself to determne, and regardless of any acts that William C. Niblack, as trustee,

may have done in applying to a state court for the return of funds paid to him or his predecessors as Trustees in Bankruptcy by the District Court of the United States, we feel quite strongly that he could not under any circumstances create an estoppel either against himself or the bankrupt estate, or the United States District Court.

It appears from an examination of the decisions that the Illinois rule adopted by the state courts in Illinois, as to the right to follow trust funds, is different from the Federal rule as announced by the different Federal courts, including this court. The Federal rule as laid down in a number of cases is that if a fiduciary commingles a trust fund with his own private funds, and then becomes insolvent, the right of the *cestui que* trust to follow the trust funds is not thereby destroyed, but the *cestui que* trust is entitled to a lien or charge upon the common fund superior to that of general creditors of the trustee. The commingling being wrong, the entire fund is impressed with the trust, and as long as an amount equal to the trust fund remains in a commingled mass, the same and all of it will be made to respond to the claim of the *cestui que* trust.

> *Board of Commissioners* v. *Strawn*, 157 F. R. 49.
>
> *Mercantile Trust Co.* v. *St. Louis & S. F. R. Co.*, 99 F. R. 485.
>
> *American Can Company* v. *Williams*, 176 F. R. 616; affirmed in 178 Fed. Rep. 420.

In *Board of Commissioners* v. *Strawn*, 157 Fed. Rep. 49 (C. C. A., 6th Cir. 1907), opinion by Judge Lurton, a county treasurer in Ohio deposited taxes collected by him as a general deposit in a bank. The statutes of Ohio do not permit such a deposit. It was held that the bank can acquire no title to money so deposited as against the county, nor can estoppel arise from any act of its officers which will prevent recovery of such money from the

receiver of the bank if it can be identified or traced into other property where it has been mixed with the funds of the bank.

In that case Judge Lurton said:

> "The mere fact that this tax fund, which, for short, we shall call the 'trust fund' has been blended with the moneys of the bank does not fasten a lien upon the balance which the bank had on hand when its doors were closed. If trust moneys be wrongfully invested in bonds or stocks or realty, or promissory notes or bills, and the particular property into which the trust fund has been changed can be ascertained, the owner may take the property and ratify the investment. Or, if the trust funds, along with the property of the trustee or bailee, be invested in an ascertained property, equity will follow the trust fund, not by taking the entire property, for that would be unjust, but by fastening a charge upon the property to the extent of the trust fund therein discovered. The blending of the trust money with the money of the trustee was suffered at one time to defeat the owner's title and compel him to stand as a mere unsecured creditor. This was upon the idea that money was not earmarked, and, therefore, could not be recovered *in speci*. But the latter cases have met this difficulty in the case of blended moneys in a bank account, from which there have been drawings from time to time, by the fiction that the sums thus drawn out were from the moneys which the tortfeasor had a right to expend in his own business, and that the balance which remained included the trust fund which he had no right to use. It was upon this fiction that *Knochball* v. *Hallett*, 13 Ch. Div. 696, 726, *et seq.*, was decided. That case was approved in *National Bank* v. *Insurance Company*, 104 U. S. 54, 26 L. Ed. 693, and has been followed in many subsequent cases when the trust fund has consisted of moneys on deposit. *Smith* v. *Mottley*, 150 Fed. 266."

In *Mercantile Trust Co.* v. *St. Louis & S. F. Ry. Co.*, 99 Fed. Rep. 485 (Cir. Ct., E. Dist. Mo. 1900), Adams, District Judge, said:

> "It is now the settled doctrine that commingling

a trust fund with the private funds of the trustee does not destroy the right of the *cestui que* trust to follow it. The commingling being wrong, the entire fund is impressed with the trust; and, as long as an amount equal to the trust fund remains in the commingled mass, the same, and all of it, to the extent of the trust fund, will be made to respond to the claim of the *cestui que* trust. This last mentioned rule is in perfect correspondence with the rule first announced, requiring the *cestui que* trust to show that his money or property is in the hands of the trustee. It simply enlarges the rule, and allows recovery when and so far as the commingled fund in which the trust fund has been inextricably confused is found in the hands of the trustee. The foregoing propositions, I believe to be fully supported by the authorities, and they are well set forth in the able opinion of Judge Phillips in the case of *Metropolitan Nat. Bank of Kansas City* v. *Campbell Commission Co.* (C. C.), 77 Fed. 705."

In *American Can Co.* v. *Williams*, 176 Fed. 816 (Cir. Ct. N. Y., 1908), Hazel, District Judge, said:

"It appears that the Fredonia National Bank, while insolvent, diverted and misapplied the proceeds of certain sight drafts drawn by the plaintiff between May 17, 1905, and June 14, 1905, upon the United States Canning Company and the Fredonia Preserving Company which had been sent to the bank for collection and remittance. The plaintiff bases its right to recover the amount of the drafts on the claim that the bank mixed or blended the proceeds thereof with its own funds, and that therefore a trust was impressed upon the assets which came into the possession of the receiver. Such assets are insufficient to pay the creditors in full, though they were larger than the aggregate amount appropriated by the bank. Debtor and creditor relations between plaintiff and the insolvent bank did not exist and admittedly their relations were distinctly of a fiduciary character, that of a *cestui que* trust and trustee. There is no dispute over the proposition that the assets of the bank in the possession of the receiver are subject to an equitable lien in plaintiff's

favor to the extent that such assets have been augmented by the wrongful act of the bank. But the defendant contends that there can be no preferential payment unless the receiver has in his possession property or funds into which the amount of the drafts can with reasonable certainty be traced or which in their entirety or in part constitute the proceeds thereof. Before discussing the stipulated facts it probably would not be inappropriate to first state the general rule applicable to fastening special trusts upon receivers of insolvent banking institutions. The great weight of authorities as shown by the decisions of the Federal courts which, if there is any conflict of decision, this court is obliged to follow is that trust funds that have been fraudulently diverted or appropriated can be recovered of a receiver whenever such funds are susceptible of identification in the hands of the possessor, and if the trust funds have been intermingled with other property or money rendering it undistinguishable without fault of the trustee a court of equity is powerless to grant relief. But to this rule there are well-recognized exceptions and modifications, and hence, where it is shown that the unlawful appropriation of trust funds resulted in swelling or increasing the general assets of the insolvent then, even though there was such intermingling of the trust funds with the general funds as to render their identity impossible, a court of equity will decree priority of payment to the *cestui que* trust over the common creditors. That a trust is impressed upon the general mass by reason of the confusion resulting from mingling therewith the converted fund was first authoritatively decided in *Frelinghuysen* v. *Nugent* (C. C.), 36 Fed. 239, where the rule is stated as follows:

> 'Formerly the equitable right of following misapplied money or other property into the hands of the parties receiving it, depended upon the ability of identifying it; the equity attaching only to the property misapplied. This right was first extended to the proceeds of the property, namely, to that which was procured in place of it by exchange, purchase, or sale. But if it became confused with other property of the same

kind, so as not to be distinguishable, without any fault on the part of the possessor, the equity was lost. Finally, however, it has been held as the better doctrine that confusion does not destroy the equity entirely, but converts it into a charge upon the entire mass, giving to the party injured by the unlawful diversion a priority of right over the other creditors of the possessor. This is as far as the rule has been carried.'

This doctrine was expressly approved by the Supreme Court in *Peters* v. *Bain*, 133 U. S. 670, 10 Sup. Ct. 354, 33 L. Ed. 696, and the same equitable principle was applied in *National Bank* v. *Insurance Company*, 104 U. S. 54, 26 L. Ed. 693. And such important extension from the former English rule was logically and comprehensively stated by the Circuit Court of Appeals for the Ninth Circuit in *Spokane County* v. *First National Bank of Spokane*, 68 Fed. 979, 16 C. C. A. 81."

The latter case was affirmed by the Circuit Court of Appeals, 178 F. R. 421.

This is also the doctrine of the English courts, in

In re Richards, 45 Ch. D. 589, 59 L. J. Ch. 728, 63 L. T. Rep., N. S., 451;

In re Hallett, 13 Ch. D. 696, 49 L. J. Ch. 415, 42 L. T. Rep., N. S., 421. This latter case, *Knochball* v. *Hallett*, *in re Hallett's estate*, 13 Ch. D. 696, was cited with approval by this court in *Central National Bank* v. *Insurance Company*, 104 U. S. 54, at 68. In this latter case this Court said:

"The Master of the roles, Sir George Jessel, showed that the modern doctrine of equity as regards property disposed of by persons in a fiduciary position is that, whether the disposition be rightful or wrongful, the beneficial owner is entitled to the proceeds, whatever be their form, provided only he can identify them. If they cannot be identified by reason of the trust money being mingled with that of the trustee, then the *cestui que* trust is entitled to a charge upon the new investment to the extent of

the trust money traceable into it; that there is no distinction between an express trustee and an agent or bailee, or collector of rents, or anybody else, in a fiduciary position."

The court cited with approval the rule of Vice-Chancellor Wood that

> "If a man mixes trust funds with his own the whole will be treated as the trust property, except so far as he may be able to distinguish what is his own."

In this case Mr. Justice Mathews also said:

> "The whole subject of this discussion was very elaborately and with much learning reviewed by the Court of Appeal in England, in the very recent case *of Knochball v. Hallett, in re Hallett's Estate*, 13 Ch. D. 696. It was there decided that if money held by a person in fiduciary character, though not as trustee, has been paid by him to his account at his banker's the person for whom he held the money can follow it, and has a charge on the balance in the banker's hands, although it was mixed with his own moneys; and in that particular the court overruled the opinion in Ex parte Dale & Co., supra. It was also held that the rule in Clayton's Case (1 Mer. 572), attributing the first drawings out to the first payments in, does not apply; and that the drawer must be taken to have drawn out his own money in preference to the trust money and in that particular *Pennell* v. *Deffel* was not followed."

In the case now before this court for consideration there has been no transfer of the trust funds to a third person, in fact, there are no complications of any kind. The LaSalle Street Trust and Savings Bank was the depository, and is therefore the fiduciary or trustee. Most of the cases in the reports deal with a situation in which the trustee deposits funds of the trust estate in a bank account together with his own funds. In this case, however, the LaSalle Street Trust and Savings Bank *was itself the depository, and is therefore the*

fiduciary or trustee which received the trust funds of bankrupt estates and wrongfully mingled them with its own property or assets. As to commercial depositors, the title to the moneys deposited passed to the bank and it became a mere debtor to the depositor, but as to trust funds, the bank did not acquire the title and if it mingled these trust funds with its other assets the trust estates are entitled to a lien or charge upon the common fund or property prior to the rights of the general creditors. This is the holding of the decisions, and when applied to the case at bar, means that the trustees of the bankrupt estates are entitled to a prior claim against all of the assets of the bankrupt depository.

THE POSITION OF THE BANK AS A SECURED CREDITOR IS NOT DIFFERENT FROM THAT OF AN UNSECURED CREDITOR.

The claim filed by the receiver was originally filed as an unsecured claim. (Rec. p. 7). Three years after the claim was filed on August 21, 1917, the receiver filed an amended proof of secured claim. We are unable to appreciate how it could make any possible difference in the situation presented to this court whether the bank's claim was secured or unsecured. The fact remains that the bank, through its receiver, filed a claim in the District Court, and when it did so it submitted itself to the jurisdiction of the District Court to enter such order as it might deem proper.

The District Court acquired full and complete jurisdiction of the person of the receiver when, on September 11, 1914, he first filed his proof of unsecured claim. This jurisdiction of the person having once attached, was not, nor could it be, impaired in any manner, and the fact that the receiver subsequently filed an amended proof of secured claim does not in any manner impair the juris-

diction of the District Court over the person of the receiver or over the subject matter.

We are unable to see any relevancy of materiality in the argument advanced by counsel for the respondent based on the fact that the bank's claim was a secured claim.

THE APPLICATION OF THE MAXIMS "HE WHO SEEKS EQUITY SHOULD DO EQUITY" AND "HE WHO COMES INTO EQUITY SHOULD HAVE CLEAN HANDS."

Counsel for the respondent claims that these maxims have no application in the present case. His reasoning, however, is not convincing. As we understand counsel's argument, it is that the receiver of the bank need not have filed a claim in the bankruptcy court. If this be conceded, the fact remains that the receiver did file first an unsecured claim and then a secured claim, and thereby invoked the aid of the bankruptcy court to pay the whole or such part of his claim as might be required after he had exhausted his collateral security. Counsel for the respondent seems to think that the motive and purpose for which the receiver came into the District Court has some bearing upon this question. We do not agree with that contention. Having acquired jurisdiction of the person of the receiver, it was for *the court* to determine, without regard to the motives of the receiver in invoking its aid, what relief should ultimately be granted.

The whole foundation of the Bankruptcy Act in its aspect in relation to the administration of estates for the benefit of creditors is the equitable maxim "Equality is equity." Every provision in the Bankruptcy Act, from beginning to end, has for its purpose just two things,—(a) The equal distribution of the assets of a

bankrupt estate among his creditors, and, (b) The discharge of the bankrupt from further liability. There is nothing else in the Bankruptcy Act, from one end to the other except provisions designed to effectuate these two objects. Therefore, when a creditor becomes a claimant of a bankrupt estate, and files his claim in the Bankruptcy Court, and obtains an equal share of the estate of the bankrupt, he is getting it as the result of the fundamental principle and purpose of the Bankruptcy Act, which is to secure an equal distribution of the estate among creditors.

At common law, the creditors of an insolvent debtor did not participate equally. The race was to the swift. The sheriff who held an execution was not concerned about the claim of any one except the plaintiff in the execution. His duty was to levy on the assets to an amount sufficient to satisfy the plaintiff's claim in full, without regard to what effect it might have on the other creditors of the insolvent.

At common law no machinery existed for the *equal* distribution of the estates of insolvents among their creditors until courts of equity began to apply the equitable maxim "Equality is equity," and through the instrumentality of a receiver, accomplished a fair and equitable distribution of the assets of the insolvent.

When bankruptcy acts were enacted they immediately adopted this foundation principle in the distribution of bankrupt estates, and bankruptcy courts are in reality courts of equity administering the estates according to equitable principles, and therefore, the creditor who invokes the aid of the bankruptcy court by filing a claim is getting the benefit of that equitable principle which is the foundation of the act.

The receiver of the insolvent depository therefore,

when he filed a claim in the Bankruptcy Court and asked to be permitted to participate *equally* in the assets of the bankrupt estate, was applying to a court administered *upon equitable principles* and obtaining the benefit of *equitable rights* and remedies which he would not have had at common law.

We are unable to see any merit in the contention of respondent's counsel that because the claim was filed by Niblack as receiver instead of by the insolvent depository itself, that the court could not deal with the receiver as the representative of the insolvent depository.

When a receiver goes into a court other than the one appointing him, and invokes its aid for any purpose, he submits to the jurisdiction of *that* court, and that court has just as much right to deal with him and with the subject matter of his claim as though he was not a receiver. Indeed, it could not deal with him on any other basis.

Counsel's argument that

> "The creditors of both concerns are equally innocent victims and there would seem to be no justification in favoring one set of their creditors at the expense of the other"

ignores every principle of law and equity applicable to a situation of this kind.

If these deposits, made by the trustees in bankruptcy in the depository, were *trust funds* and did not create the relation of debtor and creditor, the creditors of the insolvent bank have no more right or claim to them than if they were deposited in another bank. They are not part of the assets of the bank, but are a separate fund, the title to which was not in the bank and could not pass to the receiver or the creditors. The fact that the creditors of the bank may be innocent does not justify a court in giving them trust funds which never

belonged to the bank. Their rights are not in any manner diminished or impaired by giving those trust funds to the trust estate to which they belong instead of to a set of creditors of the bank to whom they never belonged.

We are unable to appreciate anything unjust or unfair in doing so.

On the other hand, to take these trust funds from the trust estates to which they rightfully belong and give them to commercial depositors of the bank, or its general creditors, (in the words of Mr. Justice Farmer of the Supreme Court of Illinois) "would, be *both legally and morally wrong.*"

We respectfully submit that no good reasons are shown in the brief filed on behalf of the respondent why the contentions in our opening brief on behalf of the petitioner should not be sustained.

Respectfully submitted,

HENRY M. WOLF,
A. F. REICHMANN,
ARTHUR M. COX,
Counsel for Petitioner.

No. 846. 317

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1921.

FRANK G. GARDNER, as Trustee in Bankruptcy of the O'GARA COAL COMPANY,

Petitioner,

vs.

CHICAGO TITLE AND TRUST COMPANY, as Receiver of the LaSalle Street Trust and Savings Bank,

Respondent.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF AND ARGUMENT FOR PETITIONER.

HENRY M. WOLF,
A. F. REICHMANN,
ARTHUR M. COX,

Counsel for Petitioner.

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CHICAGO TITLE AND TRUST COMPANY, as Receiver of the LaSalle Street Trust and Savings Bank, Respondent.

Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF AND ARGUMENT FOR PETITIONER.

STATEMENT OF THE CASE.

This case comes before this court upon a writ of certiorari granted to the petitioner, Frank G. Gardner, as Trustee in Bankruptcy of the O'Gara Coal Company, to review a decision of the United States Circuit Court of Appeals within and for the Seventh Circuit. The following is a brief statement of the facts in chronological order, the questions involved and the manner in which they were raised:

1. The O'Gara Coal Company is a corporation organized under the laws of the State of New York, duly licensed to transact business in the State of Illinois and having its chief business office in the City of Chicago.

It owned and operated coal mines in Saline County, Illinois, and also owned the entire capital stock of certain subsidiary coal companies, one of which was the Harrisburg Saline Collieries Company, an Illinois corporation, the capital stock of which consisted of 1,500 shares of the par value of one hundred dollars ($100) each.

2. La Salle Street Trust and Savings Bank was a banking corporation organized in the year 1912 under an act of the Legislature of the State of Illinois entitled "An Act Concerning Corporations with Banking Powers, approved June 16, 1887, as amended." The La Salle Street Trust and Savings Bank was originally organized under the National Banking Act, but in the year 1912 surrendered its charter and became incorporated under the Banking Act of Illinois.

3. On *August 5, 1913*, the District Court of the United States, for the Northern District of Illinois, pursuant to Section 61 of the Bankruptcy Act, entered an order of record appointing and designating the La Salle Street Trust and Savings Bank as a depository of moneys of bankrupt estates in the district, and said La Salle Street Trust and Savings Bank (hereinafter called "the Depository") executed an acceptance of the appointment and filed in the District Court its bond, with the Illinois Surety Company as surety, in the penal sum of fifty thousand dollars ($50,000), conditioned as follows:

> "The Condition of this obligation is such that whereas, the District Court of the United States for the Northern District of Illinois, Eastern Division thereof, by its order entered of record on the 5th day of August, A. D. 1913, has appointed and designated the La Salle Street Trust & Savings Bank as a depository of money of bankrupt estates under and by virtue of an act to establish a uniform system of bankruptcy through the United States, approved July 1, A. D. 1898, and all amendatory acts thereof, which appointment and designation has been duly

executed by the La Salle Street Trust & Savings Bank: *Now, therefore, if the La Salle Street Trust & Savings Bank shall and does at all times faithfully and honestly keep and fully account for and pay over according to law all deposits and funds which it shall at any time receive or become accountable for as such depository under and by virtue of the appointment and designation as aforesaid*, then the obligation shall be void; otherwise, the same shall remain in full force and effect."

4. On *September 8, 1913*, the Depository, for a valuable consideration, acquired the promissory note of the O'Gara Coal Company for the principal sum of fifteen thousand dollars ($15,000), dated September 6, 1913, payable on demand, at the La Salle Street Trust and Savings Bank, to the order of Charles B. Munday (who was then vice-president of the Depository), with interest at the rate of six per cent (6%) per annum after the date thereof. To secure the payment of said note the O'Gara Coal Company delivered to the payee fifteen hundred (1,500) shares of the capital stock of the Harrisburg Saline Collieries Company, an Illinois corporation, of the par value of one hundred dollars ($100) each, constituting the entire authorized issue of capital stock of said corporation. On September 8, 1913, Charles B. Munday, vice-president of the Depository, for a valuable consideration, endorsed the promissory note in blank, without recourse, and delivered it to the Depository, together with the collateral described in said note.

5. On *September 13, 1913*, a petition was filed in the District Court of the United States for the Northern District of Illinois, to declare the O'Gara Coal Company a bankrupt. On *October 3, 1913*, an order of adjudication was entered. On *November 11, 1913*, Thomas J. O'Gara, Fred A. Busse and Edward Weltman were appointed and qualified as trustees in bankruptcy of the O'Gara Coal Company.

6. At various times between November 11, 1913, and June 11, 1914, the trustees in bankruptcy of the O'Gara Coal Company deposited funds of the bankrupt estate in the Depository, which said deposits were duly credited to said trustees in bankruptcy on the books of said Depository, and said deposits, at the close of business on June 11, 1914 (when said Depository suspended), aggregated the sum of nineteen thousand eight hundred forty-three dollars and sixty-two cents ($19,843.62). (Rec., 5.) During this period the Depository continued to be at all times the owner and holder of the promissory note of the O'Gara Coal Company for fifteen thousand dollars ($15,000) above referred to, together with the collateral securing the same.

7. On *June 12, 1914*, the Depository, having become insolvent, closed its doors, and on June 18, 1914, a bill of complaint in equity was filed in the Circuit Court of Cook County, Illinois, in the name and on behalf of the People of the State of Illinois *ex rel* James J. Brady, Auditor of Public Accounts (acting through the Attorney General of the State of Illinois) for the dissolution of the charter of the Depository and for the appointment of a receiver for the winding up of its affairs on the ground that it was insolvent and was being conducted in an illegal, fraudulent and unsafe manner, and on June 19, 1914, William C. Niblack was appointed receiver, and as such receiver he took possession of the assets of the Depository, included among which was the promissory note of the O'Gara Coal Company above referred to, together with the collateral securing the same. William C. Niblack continued to act as receiver until his death in 1920, when the respondent, Chicago Title and Trust Company, was appointed as his successor and has continued as such and is now acting as receiver of the Depository.

8. In *July, 1914*, Fred A. Busse, one of the trustees

in bankruptcy of O'Gara Coal Company, died, and on July 28, 1914, William C. Niblack (who was also receiver of the Depository), was appointed and qualified as successor trustee to Fred A. Busse. O'Gara, Weltman and Niblack continued to act as trustees until June 30, 1916, at which time William C. Niblack became the sole trustee in bankruptcy of said bankrupt estate and continued to act as such up to the time of his death on June 6, 1920.

9. On *September 11, 1914*, the receiver of the Depository filed with the receiver in bankruptcy a claim against the bankrupt estate of the O'Gara Coal Company in the form of proof of unsecured debt, upon the promissory note of \$15,000, which proof of debt was amended on October 21, 1917, as a secured claim on said note. (Rec., 7, 1112.)

10. On *June 5, 1916*, William C. Niblack, Thomas J. O'Gara and Edward Weltman, as trustees in bankruptcy of O'Gara Coal Company, filed in said proceeding in the Circuit Court of Cook County, Illinois, their petition setting forth the deposit by said trustees in bankruptcy in said Depository, prior to the suspension thereof, of the said sum of \$19,843.62, and praying said Circuit Court to allow in favor of said Trustee a *preferred claim* to the amount of \$19,843.62, and to adjudge the same entitled to priority of payment out of the assets of said Depository in the possession of the receiver, in advance of the general unsecured creditors, or in the event that priority of said claim was denied, that the claim might be allowed as a general claim against the assets of the said Depository. (Rec., 6, 7.) After June 30, 1916, William C. Niblack acted as sole trustee in bankruptcy of the O'Gara Coal Company and also as receiver of the Depository. During the year 1916, William C. Niblack as receiver of the Depository, paid to himself as sole trustee in bank-

ruptcy of the O'Gara Coal Company, a dividend of twenty-five per cent (25%) upon his claim as trustee. In 1918 Niblack, as receiver of the Depository, paid to Niblack as trustee in bankruptcy of the O'Gara Coal Company, another dividend of ten per cent (10%).

11. On *May 22, 1918*, William C. Niblack, as trustee in bankruptcy of the O'Gara Coal Company, filed a verified petition with the referee in the bankruptcy proceedings (Rec., 16, 19), in which he represented that he was the sole acting trustee in bankruptcy of the coal company, vested with the exclusive right, title and interest in and to its assets as of September 13, 1913. He alleged the execution and delivery of the promissory note by the O'Gara Coal Company to Munday on September 6, 1913, and its endorsement and delivery by Munday to the Depository. He further alleges the deposit of funds of the bankrupt estate of the O'Gara Coal Company by the trustees in the Depository aggregating, on June 18, 1914, \$19,843. He also alleges that on June 13, 1914, the Depository ceased to transact business and the filing of the bill in equity on the relation of James J. Brady, Auditor of Public Accounts, and the appointment of himself as receiver. He further alleges that no part of the deposits have been paid except the sum of \$4,963.35, representing the dividend of 25 per cent declared and paid by him as receiver.

12. Niblack, as trustee, further represents that by virtue of Section 68 of the Bankruptcy Act he is entitled to set-off against his claim as receiver of the Depository, the amount due the bankrupt estate of the O'Gara Coal Company, and that upon payment of such balance the collateral held by him as receiver be released and delivered to him as trustee.

13. On *May 27, 1918*, William C. Niblack, as receiver of the Depository, filed an answer to his petition as sole

trustee in bankruutcy of the O'Gara Coal Company, in which he denies that by virtue of Section 68 of the Bankruptcy Act, Niblack, as trustee in bankruptcy, is entitled to set-off against the claim of Niblack as receiver of the Depository, the said sum of $14,880.27, or any portion thereof, but on the contrary, as receiver he alleges that the petitioner, as trustee, is not entitled to set-off any amount whatever against the amount of said promissory note held by him as receiver of the Depository. (Rec., 19, 20.)

14. On *October 26, 1920*, upon the hearing of this petition, Sidney C. Eastman, referee in bankruptcy, entered an order (Rec., 3, 8), adjudging and decreeing that the prayer of the petition (filed by William C. Niblack as sole trustee in bankruptcy of the O'Gara Coal Company, praying for set-off) be granted, and that the trustee pay the receiver of the Depository the amount due on said promissory note, after allowing as a set-off $12,894.93 (the amount of the funds of the bankrupt estate deposited by the trustees with the Depository, less dividends of $4,963.35 and $1,985.34), and that upon the payment of said amount the liability of the bankrupt upon said note be extinguished, the collateral surrendered by the receiver to the trustee and the claims filed by the receiver stand as satisfied on the records of the bankrupt estate.

15. On *November 1, 1920*, Chicago Title and Trust Company, as receiver of the Depository, filed in the District Court its petition to review this order.

16. On *February 3, 1921*, a petition for review was heard by Honorable George A. Carpenter, district judge, who on that date entered an order (similar in all respects to the order entered by the referee) granting the prayer of the petition of the trustee in bankruptcy to set-off the net amount on deposit with the Depository, less dividends,

against the promissory note of the bankrupt coal company.

17. On *February 11, 1921,* Chicago Title and Trust Company, as receiver of the Depository, filed in the District Court its petition for appeal to the Circuit Court of Appeals (Rec., 29, 30), and an order was entered the same day allowing its appeal. On February 11, 1921, a petition to review and revise was also filed in the United States Circuit Court of Appeals for the same circuit, to review the order of the District Court above referred to. (Rec., 57, 58, 59.) On March 31, 1921, an order was entered by the Circuit Court of Appeals consolidating the petition to review and revise and the appeal, and directing that they be heard together. (Rec., 60.)

18. On January 3, 1922, the United States Circuit Court of Appeals entered an order remanding the proceeding to the District Court, with directions to set aside the order or decree of the District Court appealed from and directing that the petition to set-off the claims be dismissed. (Rec., 52.)

The decision of the Circuit Court of Appeals is reported in 278 Federal Reports, page 509.

The court bases its conclusion that the right of set-off does not exist solely upon the ground that the depository could not have asserted a right to set-off the note of the bankrupt against the moneys of the bankrupt estate deposited by the trustees. The court's view is that mutuality is essential in order to give a right of set-off. Therefore it concludes no right of set-off can exist in favor of the trustee in bankruptcy of the coal company against the note of the bankrupt held by the receiver of the Depository. The reasoning of the court is predicated entirely upon the doctrine that the right of set-off must be mutual.

The fact that the bank was a depository and acting in a fiduciary capacity under an appointment by the bankruptcy court, the Court of Appeals held, had no effect whatever upon the rights of the trustees, saying,

> "The fact that this bank was a depository which under the law the court had designated as such also militates against the proposition of mutuality of debt. To the extent that legally authorized depositories are less than the whole number of banks, the choice of the trustee is narrowed to such banks as have been duly authorized. Had there been but one, the trustee would have only 'Hobson's choice.' *Surely it could not have been intended that, in limiting the number of depositories in which such funds may be placed, there be incurred even remotely the risk of the lawful appropriation of funds to which normally all creditors are entitled to the claim of one creditor whose legal or equitable standing was not different from the others, save only in the fortuitous circumstance that the court's officer happened to deposit there funds of the bankrupt estate.*"

On May 9, 1919, the District Court entered an order in the bankruptcy proceedings of the O'Gara Coal Company providing for the payment in full of its claims (O'Gara Coal Company, 260 Federal Reporter 742), so that the effect of the decision of the Circuit Court of Appeals in this proceeding would be that the receiver of the recalcitrant depository shall be paid in full by the very court whose trust funds the depository misappropriated, while the trustee in bankruptcy must go to the state court and get what it can from the receiver in that proceeding.

The decision of the Circuit Court of Appeals is based upon the premise that the deposit of funds of a bankrupt estate in a depository designated pursuant to the provisions of the Bankruptcy Act creates only the relation of debtor and creditor between the depository and the trustees of the bankrupt estate, and that if the depository misappropriates or converts the trust funds of the bank-

rupt estate there is no moral wrong involved, but it merely creates a debt in favor of the trustees as "*creditors.*" The Court of Appeals refers to such a deposit of trust funds in a depository which has misappropriated and converted the trust funds of the bankrupt estate as "THE CLAIM OF ONE CREDITOR *whose legal or equitable standing was not different from the others* save only in the fortuitous circumstance that the court's officer happened to deposit there the funds of the bankrupt estate."

Under this decision, therefore, the question arises whether a depository which has accepted a trust pursuant to the provisions of the Bankruptcy Act and then converted trust funds entrusted to it pursuant to the court's appointment, is to be treated as a wrongdoer which has violated its trust which, when it asserts the claim against the bankrupt estate which it has looted and does not come into equity with clean hands, or whether it can with impunity come *into the very bankruptcy court that appointed it and, without restoring the funds it has misappropriated, assert a claim against the same bankrupt estate whose funds were entrusted to it and be treated on the basis of an ordinary creditor.*

Specification of Errors Relied On.

I.

The Circuit Court of Appeals erred in remanding this cause to the District Court with directions to set aside the order or decree of the District Court appealed from.

II.

The Circuit Court of Appeals erred in ordering that the petition to set off the claims be dismissed.

III.

The Circuit Court of Appeals erred in entering the order on the petition to review and revise, setting aside the order of the District Court and directing that the petition to set off the claims be dismissed.

IV.

The Circuit Court of Appeals erred in ordering the costs on the appeal to be taxed against the appellee.

V.

The Circuit Court of Appeals erred in ordering that the costs on the petition to review and revise be taxed against the respondent.

BRIEF.

I.

UNDER THE PROVISIONS OF THE BANKRUPTCY ACT THE RELATION OF A DEPOSITORY TO THE TRUSTEES OF BANKRUPT ESTATES IS A **FIDUCIARY RELATION**, AND IS NOT THE USUAL DEBTOR-CREDITOR RELATION WHICH A BANK SUSTAINS TOWARDS ITS ORDINARY COMMERCIAL DEPOSITORS.

IF THE RELATION OF A DEPOSITORY TO THE TRUSTEES WHO DEPOSIT FUNDS OF BANKRUPT ESTATES IS MERELY THAT OF DEBTOR AND CREDITOR THEN THE PROVISIONS OF THE ACT AND THE COVENANTS IN THE BOND OF THE DEPOSITORY ARE MEANINGLESS.

IF THE DEPOSITORY EMBEZZLES OR MISAPPROPRIATES OR CONVERTS TO ITS OWN USE THE TRUST FUNDS OF BANKRUPT ESTATES DEPOSITED WITH IT FOR SAFEKEEPING, AND FAILS OR REFUSES TO "PAY THEM OVER ACCORDING TO LAW," IT HAS BETRAYED THE TRUST REPOSED IN IT BY LAW AND BY THE COURT, JUST AS MUCH AS THOUGH A TRUSTEE OR RECEIVER OR CUSTODIAN OR A MARSHAL HAD CONVERTED OR MISAPPROPRIATED A PART OF THE ESTATE OF A BANKRUPT IN HIS POSSESSION.

A DEPOSITORY IS TO ALL INTENTS **AN OFFICER OF THE COURT.** MONEYS DEPOSITED IN A DESIGNATED DEPOSITORY ARE **IN CUSTODIA LEGIS.**

Ex parte Prescott, 19 Fed. Cases 1283 (2 Gallison's reports 145).

Morris v. Carnegie Trust Co., 139 N. Y. Supp. 969. (Reversed on a different point, 213 N. Y. 185.)

Jones v. *Merchants National Bank of Boston*, 76 Fed. Rep. 683 (35 L. R. A. 698).

Corbitt v. *Farmers' Bank of Delaware*, 114 Fed. Rep. 602.

Osborne v. *United States*, 91 U. S. 474.

First National Bank of Cripple Creek v. *Lundenderry Mining Co.*, 114 Pac. 313.

Thomas v. *Chicago, etc., Railroad Co.*, 37 Fed. Rep. 548.

Fagan v. *Cullen*, 28 Fed .Rep. 843.

U. S. v. *Mason*, 218 U. S. 517.

Bankruptcy Act, Section 61, is as follows:

Depositories for Money: "Courts of bankruptcy shall designate, by order, banking institutions as depositories for the money of bankrupt estates, as convenient as may be to the residences of trustees, and shall require bonds to the United States, subject to their approval, to be given by such banking institutions, and may from time to time as occasion may require, by like order increase the number of depositories or the amount of any bond or change such depositories."

Section 50h is as follows:

"Bonds of referees, trustees and designated depositories shall be filed of record in the office of the clerk of the court and may be sued upon in the name of the United States for the use of any person injured by a breach of their conditions."

Section 47a is in part as follows:

"Trustees shall respectively deposit all money received by them in one of the designated depositories."

These sections are mandatory.

87 C. C. A. 521.

Hattig Mfg. Co. v. *Edwards*, 160 Fed. Rep. 619;

Bankruptcy Rule XXIX is as follows:

(104) "No moneys deposited as required by the act shall be drawn from the depository unless by check or warrant, signed by the clerk of the court, or by a trustee, and countersigned by the judge of the court, or by a referee designated for that purpose, or by the clerk or his assistant under an order made by the judge, stating the date, the sum, and the account for which it is drawn; and an entry of the substance of such check or warrant, with the date thereof, the sum drawn for, and the account for which it is drawn, shall be forthwith made in a book kept for that purpose by the trustee or his clerk; and all checks and drafts shall be entered in the order of time in which they are drawn, and shall be numbered in the case of each estate. A copy of this general order shall be furnished to the depository, and also the name of any referee or clerk authorized to countersign said checks."

Sections 995 and 996 of the Revised Statutes, as amended by the Act of February 19, 1897, c. 265, Section 3, 29 Stats. 578 (U. S. Compiled Statutes, 1901, page 711), are as follows:

995. "All moneys paid into any court of the United States or received by the officers thereof in any case pending or adjudicated in such court shall be forthwith deposited with the Treasurer, an assistant treasurer, or a designated depository of the United States, in the name and to the credit of such court; *provided*, that nothing herein shall be construed to prevent the delivery of any such money upon security, according to agreement of parties, under the direction of the court."

996. "No money deposited as aforesaid shall be withdrawn except by order of the judge or judges of said courts, respectively, in term or in vacation, to be signed by such judge or judges, and to be entered and certified of record by the clerk; and every such order shall state the cause in or on account of which it is drawn. And it shall be the duty of the judge or judges of said courts, respectively, to cause any moneys deposited as aforesaid, which have re-

mained in the registry of the court unclaimed for ten years or longer, to be deposited in a designated depository of the United States, to the credit of the United States."

The Act of March 24, 1871, c. 2, Secs. 1, 4, Vol. 17, Stat. at Large 1, as amended in 1875 (18 Stat. at Large 320) Vol. 3 U. S. Comp. Stat. 1901, pages 3710 and 3711, is as follows:

Sec. 5504:

"Every clerk or other officer of a court of the United States, who fails forthwith to deposit any money belonging in the registry of the court, or hereafter paid into court or received by the officers thereof, with the Treasurer, assistant treasurer, or a designated depository of the United States, in the name and to the credit of such court, or who retains or converts to his own use or to the use of another any such money, is guilty of embezzlement, and shall be punished by fine not less than five hundred dollars, and not more than the amount embezzled, or by imprisonment not less than one year nor more than ten years, or by both such fine and imprisonment; but nothing herein shall be held to prevent the delivery of any such money upon security, according to agreement, of parties under the direction of the court."

Sec. 5505:

"Every person who knowingly receives, from a clerk *or other officer of a court of the United States,* any money belonging in the registry of such court, *as a deposit, loan, or otherwise,* is guilty of embezzlement, and shall be punished as prescribed in the preceding section."

The Act of Congress of March 3, 1857 (11 Stats. at Large, 249, Ch. 114), (U. S. Compiled Stats., Vol. 3, Sec. 5489), is as follows:

"If the treasurer of the United States, or any assistant treasurer, OR ANY PUBLIC DEPOSITORY, *fails safely to keep all moneys deposited by any disbursing officer or disbursing agent, as well as all moneys*

deposited by any receiver, collector, or other person having moneys of the United States, *he shall be deemed guilty of embezzlement of the moneys not safely kept*, and shall be imprisoned not less than six months nor more than ten years, and fined in a sum equal to the amount of money so embezzled."

II.

BANKRUPTCY COURTS ARE COURTS OF EQUITY AND SHOULD BE GOVERNED BY EQUITABLE PRINCIPLES.

Sabin v. *Larkin-Green Co.*, 218 Fed. 984.

In re Swofford Bros. Dry Goods Co., 180 Fed. 549.

Bardes v. *Howarden*, 178 U. S. 524, 20 Sup. Ct. Rep. 1000.

Dodge v. *Norlin*, 133 Fed. 363.

In re Siegel-Hillman's Dry Goods Co., 111 Fed. 980.

In re Filmar, 177 Fed. 170.

In re Hawks, 204 Fed. 309.

7 Corpus Juris, 27.

In re Gillaspie, 190 Fed. 88.

Mason v. *Wolkowich*, 150 Fed. 699, 10 L. R. A. Ann. N. S. 765.

In re Rochford, 124 Fed. 182.

Swarts v. *Siegel*, 117 Fed. 13.

III.

(a) "HE WHO SEEKS EQUITY SHOULD DO EQUITY." "HE WHO COMES INTO EQUITY SHOULD DO SO WITH CLEAN HANDS."

(b) THE CIRCUIT COURT OF APPEALS BASED ITS DECISION UPON THE TECHNICAL RULES OF SET-OFF. THE OFFICIAL RELATION OF TRUST OF THE DEPOSITORY TO THE BANKRUPT ESTATE AND THE BREACH OF THAT TRUST BY THE DEPOSITORY, WERE NOT CONSIDERED AS AFFECTING THE STATUS OF THE CLAIM OF THE DEPOSITORY NOR TO JUSTIFY THE DISTRICT COURT IN IMPOSING CONDITIONS TO PREVENT ITS PARTICIPATION IN THE ASSETS OF THE BANKRUPT ESTATE UNTIL IT HAD MADE RESTORATION OF THE MISAPPROPRIATED FUND OF THE ESTATE.

(c) ITS DECISION PERMITS THE DEPOSITORY WHICH HAS BREACHED ITS TRUST TO ASSERT ITS CLAIM AGAINST THE BANKRUPT ESTATE AND PARTICIPATE IN THE REMAINING ASSETS WITHOUT REQUIRING IT TO MAKE RESTORATION EVEN TO THE EXTENT OF ALLOWING THE COUNTER CLAIM OF THE BANKRUPT ESTATE FOR THE TRUST FUNDS OF THE ESTATE WHICH WERE CONVERTED BY THE DEPOSITORY TO BE SET OFF AGAINST THE CLAIM OF THE DEPOSITORY.

(d) THE EFFECT OF THEIR DECISION IS THAT THE RECEIVER OF THE ERRANT DEPOSITORY WILL BE PAID ITS CLAIM IN FULL WHILE THE BANKRUPT ESTATE WHICH HAS SUFFERED THROUGH THE DEPOSITORY'S BREACH OF TRUST WILL RECEIVE LESS THAN FIFTY PER CENT OF ITS COUNTER CLAIM. WE BELIEVE THIS IS BOTH LEGALLY AND MORALLY WRONG.

(e) SUCH A RECREANT OFFICER SHOULD NOT BE PERMITTED TO ASSERT A CLAIM IN THE COURT THAT APPOINTED IT AGAINST THE REMNANT OF THE VERY ESTATE IT HAS LOOTED, AT LEAST NOT UNTIL IT HAS MADE RESTORATION OF THE MISAPPROPRIATED FUNDS, NOR SHOULD THAT RESTORATION (WHERE THE CIRCUMSTANCES PERMIT IT TO BE WORKED OUT THROUGH THE MEDIUM OF A SET-OFF) BE MADE CONDITIONAL UPON WHETHER THERE WOULD BE A TECHNICAL RIGHT OF SET-OFF IF THE CASE WERE AN ORDINARY ACTION AT LAW, i. e., WHETHER THERE IS STRICT MUTUALITY.

IV.

IN EQUITY, MUTUALITY IS NOT ESSENTIAL TO A SET-OFF, BUT IN THIS CASE THERE IS ACTUAL AND EQUITABLE MUTUALITY.

People v. *California Safe Deposit & Trust Co.*, 141 Pac. (Cal.) 1181.

Smith v. *Kearney*, 2 Barb. Ch. (N. Y.) 533, 549.

Porter v. *Roseman*, 74 N. E. 1105.

In re Bell's Estate, 141 Pac. (Cal.) 1179.

In re Harper, 175 Fed. 412, 426.

In re Siegel-Hillman Dry Goods Co., 111 Fed. 980.

North Chicago Rolling Mills Company v. *St. Louis Ore Company*, 14 Sup. Ct. 710.

Lindsay v. *Jackson*, 2 Paige's Ch. (N. Y.) 580.

Receivers v. *Paterson Gas Light Company*, 23 N. J. Law 283, 294.

34 Cyc. 644.

Chandler v. *Drew*, 6 N. H. 469, 26 Am. Dec. 704, 707.

Morse on Banks (4th Ed.), Par. 338.

Brewer v. *Norcross*, 17 N. J. Eq. 219, 225.

Waterman on Set-off, Par. 218.

Hughes v. *Traherne, Admx.*, 64 Ill. 48.

Scott v. *Armstrong*, 146 U. S. 499, 13 Sup. Ct. Rep. 148.

Smith v. *Perry*, 95 S. W. (Mo.) 337.

St. Paul & Minn. Trust Co. v. *Leck*, 57 Minn. 87, 58 N. W. 826.

C. D. & V. R. R. Co. v. *Field*, 86 Ill. 270, 272.

V.

A COURT OF BANKRUPTCY WILL EXERCISE THIS EQUITABLE JURISDICTION IN THE MATTER OF EQUITABLE SET-OFFS IN ALL CASES COMING BEFORE IT IN WHICH A COURT OF CHANCERY WOULD EXERCISE SUCH JURISDICTION.

Cumberland Glass Mfg. Co. v. *DeWitt*, 237 U. S. 447, 35 Sup. Ct. Rep. 636.

Receivers v. *Patterson Gas Light Co.*, 23 N. J. Law, 283-288.

Scott v. *Armstrong*, 146 U. S. 499, 13 Sup. Ct. Rep. 148.

In re Bell's Estate, 141 Pac. (Cal.) 1179.

People v. *California Safe Deposit & Trust Co.*, 141 Pac. (Cal.) 1181.

VI.

COURTS OF EQUITY EXERCISE A JURISDICTION IN MATTERS OF SET-OFFS, INDEPENDENT OF THE STATUTES ON THE SUBJECT.

34 Cyc. 633.

Scott v. *Armstrong*, 146 U. S. 499, 13 Sup. Ct. Rep. 148.

North Chicago Rolling Mills Co. v. *St. Louis Ore Co.*, 14 Sup. Ct. Rep. 710.

Lindsay v. *Jackson*, 2 Paige's Chan. (N. Y.) 580.

Receivers v. *Patterson Gas Light Co.*, 23 N. J. Law, 283.

Smith v. *Perry*, 95 S. W. (Mo.) 337.

Eigenman v. *Clark*, 51 N. E. (Ind.) 725, 726.

Blake v. *Langdon*, 47 Am. Dec. 701, 705, 19 Vt. 485.

Richardson v. *Doty*, 62 N. W. (Neb.) 254.

Jeffries v. *Evans*, 43 Am. Dec. 158, 6 B. Monroe (Ky.) 119.

VII.

A PARTY WHO FILES A CLAIM AS A CREDITOR IN A BANKRUPTCY PROCEEDING SUBMITS TO THE JURISDICTION OF THE COURT ALL QUESTIONS AS TO THE RIGHT OF SET-OFF IN BEHALF OF THE BANKRUPTCY ESTATE AGAINST SUCH CLAIM.

In re Harper, 175 Fed. 412-424.

In re Siegel-Hillman Dry Goods Co., 111 Fed. 980.

VIII.

IT IS A RULE UNIVERSALLY RECOGNIZED AND APPLIED THAT THE INSOLVENCY OF THE PARTY AGAINST WHOM A SET-OFF IS SOUGHT GIVES RISE TO THE EQUITABLE INTERVENTION OF A COURT OF CHANCERY AND EQUITABLE SET-OFF WILL BE ALLOWED, EVEN THOUGH NOT ALLOWABLE AT LAW OR UNDER THE STATUTES.

IN SUCH CASES A WANT OF MUTUALITY OR THE FACT THAT THE CLAIM SOUGHT TO BE SET-OFF IS UNLIQUIDATED OR THAT THE PARTIES ARE SUING IN DIFFERENT CAPACITIES, THE REAL INTERESTS, HOWEVER, BEING THE SAME, AND OTHER OBJECTIONS PREVENTING THE SET-OFF AT LAW WILL NOT PREVENT AN EQUITABLE SET-OFF.

34 Cyc. 638, 717, 724.

North Chicago Rolling Mills Co. v. *St. Louis Ore Co.*, 14 Sup. Ct. Rep. 710-716.

Central Appalachian Co. v. *Buchanan*, 90 Fed. 454.

Brewer v. *Norcross*, 17 N. J. Eq. 219-225.

Hughes v. *Traherne, Adm.*, 64 Ill. 48.

C. D. & V. R. R. Co. v. *Field*, 86 Ill. 270, 272.

Hahn v. *Gates*, 102 Ill. App. 385, 387.

Quick v. *Lemon*, 105 Ill. 578, 586.

Engs v. *Matson*, 11 Ill. App. 639.

Ehrat v. *Marrone*, 191 Ill. App. 121.

Lindsay v. *Jackson*, 2 Paige's Ch. (N. J.) 580.

Porter v. *Roseman*, 74 N. E. (Ind.) 1105.

Barbour on Set-off, page 190.

Smith v. *Perry*, 95 S. W. (Mo.) 337.

St. Paul & Minnesota Trust Co. v. *Leck*, 57 Minn. 87, 58 N. W. 826.

Dubrueil v. *Gaither*, 56 Atl. (Md.) 965.

Dale v. *Cooke*, 4 Johnson's Ch. 11.

People v. *California Safe Deposit & Trust Co.*, 141 Pac. (Cal.) 1181.

McLane v. *Johnson*, 9 Atl. (Vt.) 837.

Eigenman et al. v. *Clark, et al.*, 51 N. E. (Ind.) 725.

Bibb Land-Lumber Co. v. *Lima Machine Works*, 30 S. E. (Ga.) 676.

In re Crystal Spring Bottling Co., 100 Fed. 265.

Doane v. *Walker*, 101 Ill. 628.

Walker v. *Doane*, 108 Ill. 236.

Jeffries v. *Evans*, 43 Am. Dec. 158 (6 B. Monroe (Ky.) 119).

Waterman on Set-off, Par. 210.

Smith v. *Kearney*, 2 Barb. Ch. 549.

Jeff. v. *Wood*, 2 P. Wms. Rep. 128.

ARGUMENT.

I.

UNDER THE PROVISIONS OF THE BANKRUPTCY ACT THE RELATION OF A DEPOSITORY TO THE TRUSTEES OF BANKRUPT ESTATES IS A **FIDUCIARY RELATION**, AND IS NOT THE USUAL DEBTOR-CREDITOR RELATION WHICH A BANK SUSTAINS TOWARDS ITS ORDINARY COMMERCIAL DEPOSITORS.

IF THE RELATION OF A DEPOSITORY TO THE TRUSTEES WHO DEPOSIT FUNDS OF BANKRUPT ESTATES IS MERELY THAT OF DEBTOR AND CREDITOR, THEN THE PROVISIONS OF THE ACT AND THE COVENANTS IN THE BOND OF THE DEPOSITORY ARE MEANINGLESS.

IF THE DEPOSITORY EMBEZZLES OR MISAPPROPRIATES OR CONVERTS TO ITS OWN USE THE TRUST FUNDS OF BANKRUPT ESTATES DEPOSITED WITH IT FOR SAFEKEEPING AND FAILS OR REFUSES TO "PAY THEM OVER ACCORDING TO LAW," IT HAS BETRAYED THE TRUST REPOSED IN IT BY LAW AND BY THE COURT JUST AS MUCH AS THOUGH A TRUSTEE OR RECEIVER OR CUSTODIAN OR A MARSHAL HAD CONVERTED OR MISAPPROPRIATED A PART OF THE ESTATE OF A BANKRUPT IN HIS POSSESSION.

A DEPOSITORY IS TO ALL INTENTS **AN OFFICER OF THE COURT.** MONEYS DEPOSITED IN A DESIGNATED DEPOSITORY ARE **IN CUSTODIA LEGIS.**

A.

THE RELATION OF A DEPOSITORY TO THE TRUSTEES OF BANKRUPT ESTATES IS A FIDUCIARY RELATION.

The Bankruptcy Act of 1867 contains no provision for the appointment of depositories. However, the Supreme Court, by its general orders* provided for the designation by the District Courts of *National Banks* as depositories, and required that all moneys received by assignees should be deposited therein.

The English Bankruptcy Law of 1883 (46 and 47 Vict. Ch. 52) makes careful provision for the conservation of

*No. 28 of the General Orders of the Supreme Court under the Act of 1867 provides for the designation by the District Court of National Banks as depositories, in which all moneys received by assignees shall be deposited, and that every assignee shall deposit all sums received by him on account of any bankrupt estate in one designated depository.

funds of bankrupt estates. In this respect it is far superior to either the Act of 1867 or the Act of 1898. The administration of bankrupt estates is under the supervision of the Board of Trade, which not only appoints the official receivers, but whose officer, called "Inspector General in Bankruptcy," supervises the administration of estates by receivers and trustees. An account called the Bankruptcy Estates Account is kept by the Board of Trade with the Bank of England, and all moneys received by receivers and trustees are required to be at once paid into that Account, whereupon the Board of Trade furnishes him with a certificate in the nature of a receipt.

The Board of Trade regulations contain strict provisions for audit of the accounts of receivers and trustees under the supervision of the Inspector General in Bankruptcy. (a)

(a) Par. 66(1):

"The Board of Trade may, at any time after the passing of this Act, and from time to time, appoint such persons as they think fit to be official receivers of debtors' estates, and may remove any person so appointed from such office. The official receivers of debtors' estates shall act under the general authority and directions of the Board of Trade, but shall also be officers of the courts to which they are respectively attached."

Par. 70(3):

"Every official receiver shall account to the Board of Trade and pay over all moneys and deal with all securities in such manner as the Board from time to time direct."

Portions of paragraph 74 are as follows:

"(1) An account called the Bankruptcy Estates Account shall be kept by the Board of Trade with the Bank of England, and all moneys received by the Board of Trade in respect of proceedings under this Act shall be paid to that account.

(3) Every trustee in bankruptcy shall, in such manner and at such times as the Board of Trade with the concurrence of the Treasury direct, pay the money received by him to the Bankruptcy Estates Account at the Bank of England, and the Board of Trade shall furnish him with a certificate of receipt of the money so paid.

(6) If a trustee at any time retains for more than ten days a sum exceeding fifty pounds, or such other amount as the Board of Trade in any particular case authorize him to retain, then, unless he explains the retention to the satisfaction of the Board of Trade, he shall pay interest on the amount so retained in excess at the rate of twenty pounds per centum per annum, and shall have no claim for remuneration, and may be removed from his office by the Board of Trade, and shall be liable to pay any expenses occasioned by reason of his default.

(7) All payments out of money standing to the credit of the Board of Trade in the Bankruptcy Estates Account shall be made by the Bank of England in the prescribed manner."

Par. 75:

"No trustee in a bankruptcy or under any composition or scheme of arrangement shall pay any sums received by him as trustee into his private banking account."

The Bank of England is, of course, a quasi governmental institution, and the Act makes express provision for the investment of funds of bankrupt estates in Government securities under the supervision of the Treasury whenever, in the opinion of the Board of Trade, it is not required for the time being by the bankrupt estates. (b)

Possibly the careful provisions of the English Bankruptcy Act of 1883 were responsible for the provisions in the Bankruptcy Act of 1898 in relation to depositories. However that may be, Congress made provision in that Act for the appointment by court order of depositories.

Congress, however, refused to be guided by the wisdom of the Supreme Court in requiring depositories to be National Banks, and in Section 61 of the Bankruptcy Act of 1898 (c) substituted the words "Banking Institutions," whatever that phrase means.

It is possible that under this term District Courts might designate *private banking firms, which are under no supervision of any kind, either National or State.* "Banking Institutions" is a high-sounding phrase, but there could be no purpose in using that term unless it

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(b) Par. 76:

"(1) Whenever the cash balance standing to the credit of the Bankruptcy Estates Account is in excess of the amount which in the opinion of the Board of Trade is required for the time being to answer demands in respect of bankrupt's estates, the Board of Trade shall notify the same to the Treasury, and shall pay over the same or any part thereof as the Treasury may require to the Treasury, to such account as the Treasury may direct, and the Treasury may invest the said sums or any part thereof in Government securities to be placed to the credit of the said account.

(2) Whenever any part of the money so invested is, in the opinion of the Board of Trade, required to answer any demands in respect of bankrupts' estates, the Board of Trade shall notify to the Treasury the amount so required, and the Treasury shall thereupon repay to the Board of Trade such sum as may be required to the credit of the Bankruptcy Estates Account, and for that purpose may direct the sale of such part of the said securities as may be necessary.

(3) The dividends on the investments under this section shall be paid to such account as the Treasury may direct, and regard shall be had to the amount thus derived in fixing the fees payable in respect of bankruptcy proceedings."

was intended not to restrict the selection of depositories to banks organized under the National Banking Act or under State banking acts. That Congress should as late as 1898 enact a provision that would permit trust funds of bankrupt estates to be deposited with a private banking firm seems incredible. The wisdom of the Supreme Court's provision under the General Orders under the Act of 1867 for the appointment of National Banks as depositories seems to be justified by the fact that most of the depositories which have failed were State banks. The two most notable instances are the Carnegie Trust Company of New York and the La Salle Street Trust & Savings Bank of Chicago.

Notwithstanding the use of the unfortunate phrase "Banking Institutions," we believe Congress intended, by the provisions of the Bankruptcy Act of 1898, to safeguard the funds of bankrupt estates when it inserted in the Act provisions for the designation of banking institutions as depositories by court order and compelled trustees to deposit all moneys received by them therein.

Section 50 (h)* classes designated depositories with referees and trustees and requires that their bonds be filed of record in the office of the clerk of the court. The District Court is given power to increase the amount of the depository's bond, and their bonds must be approved by the court before they can qualify.

We believe Congress, by these provisions in the Bankruptcy Act, intended to put the deposit of trust funds of bankrupt estates upon a different footing from ordinary deposits and so far as possible to guard against the loss of trust funds of bankrupt estates by restricting the depositories' right to deal with them as a banker and

*"Bonds of referees, trustees and designated depositories shall be filed of record in the office of the clerk of the court and may be sued upon in the name of the United States for the use of any person injured by a breach of their conditions."

requiring them to hold it as a custodian or trustee; in other words, we believe that Congress intended to avoid the relation of debtor and creditor which a banker and depositor ordinarily sustain to each other.

If a depository is neither an officer nor a quasi officer of the court and owes no duty to faithfully perform its obligation to bankrupt estates, but has only the status of a banker in relation to estates whose funds are entrusted to it for safekeeping, then the apparent intent of Congress as expressed in Sections 61(a), 50(h) and 47(a) is completely frustrated. It would seem strange if Congress, and the Federal courts charged with the administration of the Bankruptcy Act, cannot devise means to insure the safekeeping of trust funds of bankrupt estates and if a bank which has been designated as a depository fails, funds of the bankrupt estates are to be treated on the same basis as an ordinary depositor. Yet, this is precisely what has occurred in this case. Depositories have closed their doors, and not only the Court of Appeals of the Seventh Circuit (in the case at bar) but two District Courts* have expressly decided that the deposit of the trust funds of a bankrupt estate was entitled to no more consideration in law than the deposit of an ordinary individual, and that it created only the relation of debtor and creditor.

While this is the view of one Circuit Court of Appeals and two District Courts, strangely enough, in the case of United Grocery Co., where the bank was indebted to the depository in the sum of $30,000 and the receiver had deposited $7,586.04 of trust funds just before the depository closed its doors, *the referee entered exactly the kind of an order we think should have been entered in this case.*

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*Re United Grocery Co., 253 Fed. 267, Dist. Ct., Southern District of Florida, 1919;
Re Bologh, 185 Fed. 825.

In that case the Receiver of an insolvent depository filed a claim against the bankrupt estate with the referee and the referee entered an order allowing his claim *upon the repayment to the bankrupt estate by the receiver of the amount deposited by the bankrupt estate in the depository.*

The District Judge, however, finding no express provision of the Act which specifically authorized an order of that particular character, adopted the narrow view that the Court had no power to enter it. He was unable to classify, as a statutory preference, the act of the Bank in converting the funds of the bankrupt estate entrusted to it as a depository by the Receiver, and was of the opinion that the whole transaction turned on the question of set-off, (express recognition of which is given by the Act in Section 68a). No reference whatever in the opinion is made to the reserve or general power which a court of bankruptcy, like any other court having equitable powers, has and ought not to hesitate to exercise under proper circumstances nor to the fact that the depository which had been guilty of a wrong in that capacity was invoking the aid of the court it had wronged.

In that case, as in the case at bar, the Receiver of the defaulting depository actually applied to the Bankruptcy Court administering the estate which had been impaired by the acts of the depository, to allow its claim without offering to make restoration, thus submitting his rights as Receiver of the depository to the jurisdiction of the Bankruptcy Court. (*In re Harper*, 175 Fed. Rep. 412, 422; *In re Siegel-Hillman Dry Goods Co.*, 111 Fed. Rep. 986.) As the facts in this case are in all respects analogous to the facts in the case at bar, and as the reasoning of the Circuit Court of Appeals in the case at bar follows that of the District Judge in the United Grocery Co. case, it would seem that the decision of the Court of Appeals of the Seventh Circuit was in great measure due to the

decision in the United Grocery Co. case. As a matter of fact, another District Judge*, in construing Section 68a. expressed the view that it included a liability that accrued to a trustee which had not accrued to the bankrupt when the claims and liability were mutual, but it is rather shocking to the moral sense to think that a situation of the kind dealt with in the United Grocery Co. case and in the case at bar should depend upon the application of the rules of set-off. A court might as well say that where an employe has stolen funds of his employer, the right of the employe to collect wages from his employer without restoring the stolen property depends upon the law of set-off. Money misappropriated under circumstances which involve moral turpitude or a breach of trust is not in the same category as a debt incurred for the purchase of merchandise, and if a court is going to condone the wrong by completely ignoring it and dealing with the transaction on a purely commercial basis, it is losing sight of the fact that an act which is morally wrong is almost always legally wrong. That the Circuit Court of Appeals decided the question involved here without taking into consideration elements of wrongdoing on the part of the depository in failing to perform its duties is perfectly clear from a reading of the opinion. The Court refers to the deposit of the trust funds by the Trustees in the depository as a "claim of one creditor whose legal or equitable standing was not different from the others," meaning other depositors in the LaSalle Street Trust & Savings Bank.

The question thus arises for determination whether a deposit of the trust funds of bankrupt estates by receivers or trustees, in an official depository appointed by the court, creates merely the relation of debtor and creditor. Aside from the decision of the Circuit Court of Appeals

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**re Crystal Springs Bottling Co.*, 100 Fed. Rep. 265.

this case, and that of the District Court of Florida ove referred to, our research has only developed one cision in which the court expressed the opinion that ch a deposit created only the debtor-creditor relation ich a banker ordinarily sustains to a depositor.

In this case, (*re Bologh*, 185 Fed. Rep. 825, Dist. Ct. S. , N. Y. 1911), District Judge Holt expressed the opin- n that such a deposit merely created the same relation debtor and creditor as is created by any banker, but s statement is really only dictum. In that case, on the failure of the Carnegie Trust Company, e receivers of several bankrupt estates applied to the strict Court for summary orders requiring the Trust mpany, as a depository of the money of bankrupt es- tes, to summarily pay over the amounts so deposited. ne learned District Judge was of the opinion that he d no power to enter the orders asked for because he d no summary jurisdiction under the circumstances.

Whether the conclusion reached by Judge Holt not to terfere by summary proceedings was right or wrong is not necessary to determine in this case, because in at case the Receiver of the depository was not before e District Court. The Receiver had filed no claim in the ankruptcy Court, and had not submitted to its jurisdic- on.

Under these circumstances, District Judge Holt was the opinion that he had no power to summon the de- ository ,or its Receiver, before him in a summary way nd require the restoration of the trust funds entrusted it. The fact that the Carnegie Trust Company had ven a bond as a depository, which contained an express venant that the depository should "abide by all lawful ders and decrees of the court in and by the premises" d not, in the opinion of Judge Holt, authorize the sum- ary proceeding sought to be invoked.

The opinion in *in re Bologh* sets forth the argument presented to the District Court of New York as to the status a depository should occupy in the bankruptcy machinery provided by Congress with great clearness, and we think the opinion is enlightening in this respect.

This decision is also interesting because it emphasizes the rather startling fact that *there appears to be no uniformity about the provisions of depository bonds,—the bond of the LaSalle Street Trust & Savings Bank in the case at bar containing no such provision as we have quoted above from the bond of the Carnegie Trust Company.*

We suggest that this court ought to make provision by general order, for a form of bond required to be given by depositories.

B.

FUNDS OF BANKRUPT ESTATES IN DEPOSITORY ARE IN CUSTODIA LEGIS.

On the other hand, Mr. Justice Story, in *ex parte Prescott*, 2 Gallison's Reports, 145 (19 Fed. Cas. 1283) held that money deposited in a bank under a decree of the court and subject to its order was "money deposited in court," within the meaning of an Act of Congress which provided, among other things, that in all cases of admiralty jurisdiction the Clerk of the District Court should, among other fees, be entitled to 1¼% on "all money deposited in court."

In that case a ship had been condemned as prize to the captors and from the decree of condemnation the claimants appealed to the Supreme Court. The captors moved the court to order the ship and cargo to be sold and the proceeds to be deposited in the registry of the court or delivered to the captors on bail, and the court ordered the cargo sold under the direction of the marshal at pub-

c auction, and that the "proceeds of the said cargo, fter sale, be deposited one-half in the New Hampshire ank and one-half in the New Hampshire Union Bank in ortsmouth, subject to the order of this court in term, nd in vacation to the order of the Associate Justice of e Supreme Court of the United States assigned to the rst Circuit."

The cargo (and the ship also) were sold and the proeeds deposited by the marshal in the name of the Court, the Banks at Portsmouth, according to the order, when e decree of condemnation was affirmed and the proceeds elivered to the prize agent and parties entitled thereto. hereupon the Clerk of the District Court filed a petion for monition to the prize agents to bring into court, ut of the proceeds of the ship and cargo, the amount of ommissions due the Clerk.

In his opinion, Mr. Justice Story said:

> "The single question presented for decision is, whether the proceeds of the St. Lawrence and cargo were, within the meaning of this clause, 'deposited in court;' if so, then the clerk is entitled to his commission; if otherwise, then his application must be dismissed.
>
> It is argued by the counsel for the prize agents, that the money in this case never was deposited in court, *because it never was brought into court, nor actually or constructively in the hands or possession of the clerk.*"

Continuing, Mr. Justice Story said:

> "'Money deposited in court' cannot mean money brought in and deposited *sedente curia,* in the actual manual possession of the court. Such a construction would be against all practice, as well as all legal reasoning. *It must therefore mean money, which is deposited subject to the order of the court, be it in whose actual possession it may, whether of a bank or of an officer of the court.* IN SUCH A CASE, THE BANK OR OFFICER ACTS AS THE MERE FIDUCIARY, OR DEPOSITORY,

OF THE COURT, AND IN LEGAL CONTEMPLATION THE MONEY IS IN THE CUSTODY OF THE COURT. It would be a contempt of the court for any other person to intermeddle therewith. It is a mere substitute for the original property seized under the process of the court, and as much under its sole and exclusive direction, as the property itself. It is emphatically (what all property seized under admiralty process is) in the custody of the law. In this respect, it differs widely from the case of property delivered regularly and bona fide on bail. The latter is no longer subject to the control or custody of the court; and the parties to the stipulation are not the depositaries, but the debtors of the court.

On the whole, I am of opinion, that the money in the present case was, in legal intendment, deposited in court; and, consequently, the clerk was and is entitled to the fees prescribed by law."

This decision by Mr. Justice Story is very enlightening in many respects. For one thing, without specifically purporting to define the meaning of the word "depository," it embodies a definition of that word by defining the legal status and obligations of a depository. In that case, the two banks were not formally designated as depositories either by court order or pursuant to any statute. There was nothing about the deposit to charge the bank with a special responsibility except the name in which the account was opened. There was no bond or undertaking to faithfully keep or account for the moneys, but it will be noticed that Mr. Justice Story goes so far as to say that anyone intermeddling with the money in that account would be punishable for contempt of court.

Most important of all is the holding that these moneys deposited by the marshal *were in the custody of the court* just as much as though it was in the possession of the clerk.

It would be interesting to know what action Mr. Justice Story would have taken if one of these banks had failed.

One thing is certain: he would *not* have held that the deposit created merely the relation of debtor and creditor.

After the District Court *in re Bologh* refused to exercise summary jurisdiction, the Receivers of these bankrupt estates applied to the Supreme Court of New York for relief, claiming that they were entitled to preference over general creditors. The Supreme Court Trial Division dismissed the complaints, but the Appellate Division, First Department, reversed the orders. *Morris* v. *Carnegie Trust Co. et al.*, 139 N. Y. Supp. 969.

The Appellate Division held that the Receivers were entitled to priority under Section 189 of the New York State Banking Law, holding that when funds of bankrupt estates are deposited with a depository designated as a Depository in Bankruptcy, they are "moneys brought into court," or "paid into court," and are "in *custodia legis*. The Appellate Division based its reasoning on the decision of Mr. Justice Story in ex parte Prescott above referred to.

While this is a decision of a State court administering the assets of a bankrupt trust company, in accordance with the State Banking Law, and held that the preference was given by the Banking Act, *nevertheless, the important and controlling point in the decision is the Court's conclusion that the funds of bankrupt estates deposited by receivers or trustees in a depository designated by the District Court under the Bankruptcy Act, are "brought into court" and are in custodia legis just as much as if the moneys were in the actual custody of the court itself, or its clerk, or any other officer of the court.*

The Court says:

> "It seems to me to be quite clear, therefore, that the moneys deposited in the Carnegie Trust Company by the appellants were 'moneys paid into court,' as those words are used in the Banking Law."

And again:

"The words 'moneys paid into court' mean nothing different than moneys which have come by operation of law, in *custodia legis*, and it does not matter, in my opinion, whether the moneys have actually come into the custody of the court itself, or of its clerk, or of any other officer of the court, which trustees and receivers in bankruptcy undobutedly are."

This decision by the Appellate Division is quite remarkable in one respect. While the District Court of Florida in the United Grocery Co. case, and the Court of Appeals of the Seventh Circuit, in the case at bar (as well as the District Court of New York in the dictum by Judge Holt) all expressed the view that a deposit of funds of bankrupt estates in designated depositories created only the relation of debtor and creditor, *it remained for a State court administering the assets of a defunct bank organized under State Banking Law to adopt the view that such funds in a depository were "moneys brought into court" and were in custodia legis.*

In other words the State Court has put such deposits on a higher plane and given them a more dignified standing than these Federal Courts.

The decision of the Supreme Court, Appellate Division, was reversed by the Court of Appeals of New York but solely on the ground that Section 190 of the New York State Banking Law had reference only to moneys paid or brought into the *State courts of New York* and does not apply to moneys paid or brought into a Federal court.

213 N. Y. 185; 107 N. E. 346.

In *Jones* v. *Merchants National Bank of Boston*, 76 Fed. Rep. 683 (35 L. R. A. 698) the Circuit Court of Appeals of the First Circuit had before it a question in relation to two deposits, one of which was in the Merchants National Bank of Boston under standing order by which

that Bank was designated as a depository of all moneys paid into the registry of the Circuit Court of the United States for that district, and the other a deposit in the Boston Safe Deposit & Trust Company, which was not a standing depository of the Circuit Court, but in which a fund was deposited under a special order comprising moneys which had been paid into court.

The court held that a deposit made in a designated depository under Section 995 of the Revised Statutes of the United States

> "must be treated as the fund of the court as fully as though it were in the personal possession of the clerk, and therefore, subject in all respects to its summary control and disposition and entitled to protection in all particulars in order that it may be free at all times for such disposition."

The court further said:

> "*Any interference with it, or with the bank where it is deposited, or attempt thereto, which would embarrass in any degree such control or disposition, or harass the bank, or put it to expense by reason of its possessing the fund, unless the consent of the Circuit Court was first obtained, would amount, on plain principles of law, to an implied contempt, and if persisted in understandingly, to an actual one.*"

Sections 995 and 996 of the Revised Statutes, as amended by the Act of February 19, 1897, c. 265, Section 3, 29 Stats. 578 (U. S. Compiled Statutes, 1901, page 711, Title 13, Ch. 18 "Judiciary"), are as follows:

> "All moneys paid into any court of the United States or received by the officers thereof in any case pending or adjudicated in such court shall be forthwith deposited with the Treasurer, an assistant treasurer, or a designated depository of the United States, in the name and to the credit of such court; *provided* that nothing herein shall be construed to prevent the delivery of any such money upon security, according to agreement of parties, under the direction of the court.

No money deposited as aforesaid shall be withdrawn except by order of the judge or judges of said courts, respectively, in term or in vacation, to be signed by such judge or judges, and to be entered and certified of record by the clerk; and every such order shall state the cause in or on account of which it is drawn. And it shall be the duty of the judge or judges of said courts, respectively, to cause any moneys deposited as aforesaid, which have remained in the registry of the court unclaimed for ten years or longer, to be deposited in a designated depository of the United States, to the credit of the United States."

Sec. 5504 (18 Stat. 320):

"Every clerk or other officer of a court of the United States, who fails forthwith to deposit any money belonging in the registry of the court, or hereafter paid into court or received by the officers thereof, with the treasurer, assistant treasurer, or a designated depository of the United States, in the name and to the credit of such court, or who retains or converts to his own use or to the use of another any such money, is guilty of embezzlement, and shall be punished by fine not less than five hundred dollars, and not more than the amount embezzled, or by imprisonment not less than one year nor more than ten years, or by both such fine and imprisonment; but nothing herein shall be held to prevent the delivery of any such money upon security, according to agreement, of parties under the direction of the court."

Sec. 5505 (17 Stat. 2):

"Every person who knowingly receives, from a clerk or other officer of a court of the United States, any money belonging in the registry of such court as a deposit, loan, or otherwise, is guilty of embezzlement, and shall be punished as prescribed in the preceding section."

According to an opinion rendered by the Attorney-General in 1874 (14 Op., Atty. Gen., 362), Sections 995 and 996 above quoted do not apply to moneys paid into the United States courts or received by officers of such courts

in bankruptcy proceedings. This opinion was rendered before the present Bankruptcy Act of 1898 was enacted. If it is a correct statement of the law, the sections are nevertheless important because *there seems to be no reason why there should be any distinction between the legal status of moneys paid into court and deposited by the clerk in a designated depository under those sections and moneys paid into court or in the possession of an officer of the court and deposited in a designated depository under the Bankruptcy Act.*

It is interesting to note that by these sections, as amended, Congress directs moneys, "paid into any court of the United States or received by its officers" to be deposited either with the Treasurer or a designated depository of the United States "*in the name and to the credit of such court.*"

Curiously enough, the Bankruptcy Act does not provide in whose name or in what manner deposits in designated depositories shall be made.

Section 47a contains a provision that "trustees shall respectively deposit all moneys received by them in one of the designated depositories." This section does not even require the trustee to open the account in his name *as trustee*, or in the name of the bankrupt estate. Quere: Would he be violating the law if he opened the account in his individual name?

Bankruptcy Rule XXIX contains explicit directions as to how moneys may be withdrawn from a depository. "The check must be signed by the clerk of the court, or by a trustee, and *countersigned by the judge of the court*, or by a referee designated for that purpose, or by the clerk or his assistant, under an order made by the judge, stating the date, the sum and the account for which it is drawn," etc., but these wise precautions are of no avail

unless there are also directions as to how and in what name the accounts shall be kept.

It might be well if this court should amend the general orders in bankruptcy to provide that deposits of funds of bankrupt estates should be deposited in an account "in the name and to the credit of the District Court."

In *Osborne* v. *United States*, 91 U. S. 474, Mr. Justice Field said:

> "The power of the court over moneys belonging to its registry continues until they are distributed pursuant to final decrees in the cases in which the moneys are paid. If for any cause they are previously withdrawn from the registry without authority of law, the court can, by summary proceedings, compel their restitution."

In *Corbitt* v. *The Farmers' Bank of Delaware*, 114 Fed. Rep. 602, after the court had directed, by decree, a check to be drawn in favor of the Farmers' Bank of Delaware on funds to the credit of the court in its registry in the City National Bank of Norfolk, Virginia, an attachment suit was instituted in the State court and the fund sought to be attached.

Waddill, District Judge, said:

> "The question presented by the motion to abate the attachment in this cause is whether moneys paid into court pending litigation in regard thereto, and placed by order of the court in its registry or some other designated depository, pursuant to law, are the subject of attachment emanating from another court. This question is one of importance, as it not only affects the orderly administration of justice in the several courts, but goes further, and tends, as in this case, to thwart and annul the carrying out of the court's judgment, in a case fully litigated, with the parties in interest all before it. Money paid into the registry of the court, pursuant to law, can only be withdrawn therefrom by the very terms of the act

of Congress providing for the deposit, 'by the order of the judge, or the judges of said court, respectively, to be signed by such judge, or judges, and to be entered and certified of record by the clerk.' When a court causes funds to be so placed in its registry, they are to the credit of the court itself, there placed and held, to the end that its decrees and orders in respect thereto may be obeyed and carried out in accordance with its judgment rendered; and no court, other than one having a supervisory power over the acts of such court, can by any act of its own, or any decree, order, or process emanating from it, except with its leave, assert any claim to, or secure any right in or lien upon, such funds, so long as the same remain under its control. To entertain a contrary doctrine to this would not only work untold mischief and delay in legal proceedings, but would result in innumerable conflicts between the courts themselves; and the consequence would be that funds once paid into court, with a view of having the rights of parties litigant thereto adjusted and determined, instead of being disposed of by the termination of the particular controversy, would be involved in an endless chain of litigation. This subject has been before the courts, State and Federal, too frequently to now admit of serious cavil or doubt. *Wallace* v. *McConnell*, 13 Pet. 136, 150, 151, 10 L. Ed. 95; *The Lottawana*, 20 Wall. 201, 22 L. Ed. 259; *Jones* v. *Bank*, 22 C. C. A. 483, 76 Fed. 683, 686, 687, 35 L. R. A. 698; *In re Forsyth*, (D. C.) 78 Fed. 296, 302-304; *In re Cunningham*, Fed. Cas. No. 3,478; *Tuck* v. *Manning*, 150 Mass. 211, 22 N. E. 1001, 5 L. R. A. 666; *Curtis* v. *Ford*, 78 Tex. 262, 14 S. W. 614, 10 L. R. A. 529; *Holker* v. *Hennessey*, 143 Mo. 80, 44 S. W. 794, 65 Am. St. Rep. 642; *Allen* v. *Gerard*, 21 R. I. 467, 44 Atl. 592, 49 L. R. A. 351, 79 Am. St. Rep. 816."

In *Thomas* v. *Chicago, etc., Railroad Co.*, 37 Fed. Rep. 548, District Judge Brown (afterwards Mr. Justice Brown of this court) held that moneys in the hands of a Master in Chancery of the United States Court must be deposited in a depository, in compliance with Sections 995 and 996 Rev. St. U. S., thus holding that such moneys

were in custody of the court, and that the Master is an officer of the United States.

In *Fagan* v. *Cullen*, 28 Fed. Rep. 843, District Judge Brown held that a marshal who collects moneys upon executions should immediately deposit the same with the clerk or in a designated depository pursuant to the Act above referred to. He held that the clerk is entitled to his commission on said amounts paid to the marshal, so that such moneys were likewise considered by Mr. Justice Brown as moneys paid into court. There would seem to be no good reason why moneys paid to a Master or paid to a marshal, and by them deposited in a designated depository, should be treated as in *custodia legis* any more than moneys so deposited by a receiver or trustee in bankruptcy.

In *First National Bank of Cripple Creek* v. *Londenderry Mining Co.*, 114 Pac. 313, the Supreme Court of Colorado held that where a fund in controversy and held in a registry of the court was ordered to be deposited, by the clerk, in a bank, the court entering the order had power (without any statute regulating such deposits) to proceed summarily against the depository in the event of its failure to comply with the court's order to repay the moneys. The court said:

> "If it is true, as alleged, that there are no statutory provisions regulating or providing for judgment by motion or citation in this class of cases, none are needed. It is a jurisdiction existing and which has been existing from time immemorial."

Of course, we do not contend that moneys deposited pursuant to an order of court in a designated depository become moneys for which the United States would be liable to the parties in the event of the failure of the depository bank, as was contended and expressly denied in *Coudert* v. *United States,* 175 U. S. 178, 20 Sup. Ct.

Rep. 56. In that case Mr. Justice McKenna called attention to the fact that it is not without significance that when Congress authorized moneys paid into any court of the United States, or received by the officers thereof, in any cause pending or adjudicated in such court, to be deposited with a designated depository, it required it to be done "in the name and to the credit of such court" and not to the credit of the United States.

> Act of March 24, 1871 (17 Stats. at Large, 1 Ch. 2)."

The duties and responsibilities of a clerk of a Federal Court with respect to moneys paid into court are defined in *Howe* v. *United States*, for the use of Stewart, 184 U. S. 676, 22 Sup. Ct. Rep. 543. In that case this court, speaking through Mr. Justice Harlan, after referring to the various Acts of Congress regulating the disposition and custody of moneys paid into court, points out that when a clerk receives moneys paid into court it is his duty to forthwith deposit it either with the Treasurer, assistant treasurer or a designated depository. His responsibility for the money does not cease until he deposits it as required by law.

It thus clearly appears that from the time of the organization of the Federal courts, moneys paid into court were not expected or intended to be retained in the custody of the clerk. On the contrary, he was not only authorized but expected and required to deposit such moneys either with the Treasurer or assistant treasurer *or a designated depository of the United States.*

When the decisions of the Federal courts with respect to moneys paid into court or deposited with the clerk are considered, it must be borne in mind that these moneys are usually in a bank which has been designated as a depository.

What did the Court of Appeals of the Seventh Circuit mean when it said in this case

> "Surely it could not have been intended that, in limiting the number of depositories in which such funds may be placed, there may be incurred, even remotely, the risk of the lawful appropriation of funds, to which normally all creditors are entitled, to the claim of one creditor whose legal or equitable standing was not different from the others, save only in the fortuitous circumstance that the court's officer happened to deposit there funds of the bankrupt estate."

Let us analyze this statement of the Court of Appeals, because to our minds it shows rather a startling point of view. In the first place, it clearly appears that the Court of Appeals considered that it would be unfortunate if funds in the custody of the court, placed in a designated depository pursuant to law, should be treated as trust funds, or on any different basis from an ordinary bank deposit made by an individual; that such trust funds in the custody of the court should be considered on any different basis is a risk which depositories could not be deemed to have incurred "even remotely."

According to this view, there is no sanctity about funds in the custody of a court. They are no different in any respect from ordinary deposits by individuals. Quite a different view from that taken by Mr. Justice Story.

The fact that in this case deposits were made in the bank as a designated depository under the sanction of an act of Congress, had no particular significance. Such deposits are held to be on the same basis as individual deposits "save only in the fortuitous circumstance that the court's officer happened to deposit there funds of the bankrupt estate." Is not this a clear misconception of the nature of the deposits made by a court officer in a designated depository? Under these circumstances, can

it be said that when the trustees deposit funds of bankrupt estates in a designated depository, their deposit is only a "fortuitous circumstance" and that the court officer merely "happened to deposit there funds of the bankrupt estate?" It seems to us, under the circumstances, it is neither a fortuitous circumstance nor did the officer merely "happen" to deposit there the funds of the bankrupt estate.

The court's officer had no discretion in the matter. *He was compelled by law and the court's order* to deposit the funds in a designated depository, *and no where else.* Section 47a of the Bankruptcy Act required trustees to "deposit all money received by them in one of the designated depositories." The Section uses the word "shall," which is mandatory and has been so held. *Huttig Mfg. Co.* v. *Edwards*, 160 Fed. Rep. 619; 87 C. C. A. 521.

To say that when an officer deposits funds in a particular bank under a requirement of an act of Congress and a court order it is only a "fortuitous circumstance" that he "happened" to do so seems a queer conception of the significance of his acts.

The Circuit Court of Appeals evidently contemplated with alarm that there should be "incurred even remotely, the risk of" regarding trust funds in the custody of the court as entitled to any more consideration than commercial deposits by individuals or corporations.

Manifestly, this view would not only completely destroy the significance of the acts of Congress in relation to depositories under the Bankruptcy Act, but if it is sound it must also be held to apply equally to other funds in the custody of Federal courts deposited by the clerk or by a marshal in designated depositories under Sections 995 and 996 of the Act of 1871 above referred to. There can be no possible difference between the legal status of

funds paid into court and deposited by the clerk in a designated depository, under Sections 995 and 996, and funds deposited by a receiver or trustee in bankruptcy in a designated depository under Section 61 of the Bankruptcy Act. Both are court officers, and both funds are in *custodia legis*, subject to the order, decree or final disposition of the District Court.

As we have already pointed out, the policy declared by the State of New York in its banking law, is that moneys "brought into court" or "paid into court" and deposited in a designated state depository, are entitled to priority and preference in the administration of the funds of insolvent trust companies. Here is a declaration of policy by a State legislature that such founds are sacred, and must be protected at all costs. Mr. Chief Justice Waite, in *Branch* v. *United States*, 100 U. S. 673, referred to such moneys in the custody of a Federal court as money belonging to the court and held as a trust fund, saying:

> "In this case the money deposited belonged, for the time being, to the court, and was held as a trust fund pending the litigation."

In that case the fund in the custody of the court had been deposited by the clerk in a public depository designated by the Secretary of the Treasury, and it should be borne in mind that at that time Sections 995 and 996 had not been enacted.

When an individual or a corporation deposits its funds in a bank, he or it does so of his or its own volition. They are not controlled in any way. Such individual or corporation can select any bank he or it chooses from all the list of banks available. If the individual or corporation selects a weak bank, or one that is unsound and becomes insolvent, he has no one but himself to blame. He has entrusted his moneys to that bank upon its credit for reasons satisfactory to himself.

Not so with a court officer. *The court officer does not deposit the trust funds in his possession in a designated depository because he believes it to be the best and safest bank; on the contrary, he may be of the opinion that the bank is unsafe, but he has no alternative.* He is compelled to deposit the funds in that bank because the provisions of the law and the order of the court require him to do so, and hold him responsible if he does not do so.

Under these circumstances, his act in entrusting funds in his custody as a court officer to the bank so designated can, by no stretch of the imagination, be deemed "a fortuitous circumstance," nor can it be said that he merely "happened" to deposit there the funds entrusted to his custody as a court officer. *If the bank fails and becomes insolvent, the responsibility is not his, but the responsibility rests upon the court that designated the depository.*

Among the many acts of Congress dealing with depositories is the Act of March 3, 1857, which makes a public depository guilty of the crime of embezzlement if it "fails safely to keep all moneys deposited" with it. It is subject not only to a penalty of imprisonment of not less than six months nor more than ten years, but "may be fined in a sum equal to the amount of money so embezzled."

Assuming, for the sake of argument, that the Act of March 3, 1857 (11 Stats. at Large 249), (U. S. Compiled Stats. Vol. 3, Sec. 5489) applies only to "moneys of the United States" and not to trust funds belonging to or in the possession or custody of a court, is there any good reason why Congress should have determined that a public depository is guilty of embezzlement which fails to safely keep moneys of the United States, while a public depository designated by law for the deposit of funds in the custody of a court may with impunity fail safely to keep moneys deposited with it without incurring any risk

whatever because the moneys had been merely "loaned" to the depository by the court's officer, and hence no different from ordinary deposits by individuals or corporations? The Act of March 24, 1871 (17 Stats. at Large, 1), (3 U. S. Comp. Stats. 1901, p. 3711) provides that any one who receives from a court officer of the United States any money belonging in the registry of such court *as a loan, is guilty of embezzlement.*

Is there any refinement of reasoning by which the clerk or other court officer having funds of the court in his custody may lawfully "loan" such funds to a bank (if designated as a depository), but may not "loan" such funds to any one else without being guilty of embezzlement? There is no proviso or qualification in the Act of March 24, 1871, which makes it lawful for the court officer to "loan" funds in his custody even to a designated depository, and, *Quere,* if he deposits those funds in a designated depository as an ordinary deposit, merely creating the relation of debtor and creditor, what has he done except to "loan" the funds to the bank.

It seems clear that it was never contemplated by Congress that funds belonging to a court, or in its custody, should be subjected to any greater hazard of loss when deposited in a depository pursuant to the Act of Congress than moneys of the United States when so deposited. Otherwise, why should such court funds be required by Congress to be deposited *either* with the *treasurer, or an assistant treasurer, or* a *designated depository.*

No one would for a moment contend that the treasurer, or assistant treasurer, received court funds deposited by a court officer on the basis of a bank deposit, and we are unable to perceive anything in the Act of March 24, 1871 (17 Stats. 1) differentiating between the character of a deposit of such funds when made with the treasurer or

assistant treasurer and those deposited in a "designated depository" of the United States "in the name and to the credit of such court." Congress clearly was of the belief that funds in the custody of a court deposited with a designated depository of the United States were on no different basis and were just as safe as though deposited with the treasurer or assistant treasurer. Of course, if deposited with the treasurer or assistant treasurer, the Government would be responsible for their loss, while if deposited in a designated depository the Government is not liable (*Coudert* v. *United States*, 175 U. S. 178), *but that does not mean that a "designated depository of the United States" receives such funds belonging to the court and deposited "in the name and to the credit of such court" on the same basis as deposits of individuals or corporations in commercial accounts.*

To return therefore, we think it is manifest that the view expressed by the Court of Appeals of the Seventh Circuit is erroneous, and that moneys deposited in a designated depository by the clerk of a Federal court, or other Federal court officer, whether under the Act of March 24, 1871, or under the provisions of the Bankruptcy Act, cannot be considered as on the same basis as commercial deposits, in the bank acting as a designated depository, without absolutely nullifying the spirit and intent of the provisions of the acts of Congress providing for the deposit of funds in the custody of an officer of a Federal court in designated depositories.

If the view of the Circuit Court of Appeals of the Seventh Circuit, that such deposits of court funds by a court officer, are on the same basis as ordinary deposits and create only the relation of debtor and creditor, what becomes of the doctrine announced by many Federal and State courts, that funds in the custody of the court are

not subject to garnishment or attachment, and can not be made answerable to any other court in any other suit? What becomes of the doctrine laid down by Mr. Justice Story, that "it would be a contempt of the court for any other person to intermeddle therewith?" What becomes of the provisions of the Bankruptcy Rule 29, that moneys in the depository can only be drawn on a check signed by the clerk or a trustee, and countersigned by the judge or referee?

The view of the Circuit Court of Appeals of the First Circuit (*Jones* v. *Merchants National Bank*, 76 Fed. Rep. 683) is that:

> "Any interference with it, or with the bank where it is deposited, or attempt thereto, which would embarrass in any degree such control or disposition, or harass the bank, or put it to expense by reason of its possessing the fund, unless the consent of the Circuit Court was first obtained, would amount, on plain principles of law, to an implied contempt, and if persisted in understandingly, to an actual one."

How can these views be harmonized with the views of the Circuit Court of Appeals of the Seventh Circuit, that such deposits create merely the relation of debtor and creditor. If the view of the Court of Appeals of the Seventh Circuit is correct, the bank (depository) *merely owes* the money to the court officer. If that is the correct and legal relation, what is to prevent the attachment or garnishment of moneys supposed to be in the depository and which have, in reality, merely been loaned to the bank? The question appears to answer itself. It is impossible to harmonize the views expressed in these cases, and it seems to us clear that the view expressed by the Circuit Court of Appeals of the Seventh Circuit in the case at bar is erroneous and must give way.

II.

BANKRUPTCY COURTS ARE COURTS OF EQUITY AND SHOULD BE GOVERNED BY EQUITABLE PRINCIPLES.

A court of bankruptcy has unlimited jurisdiction in respect of its powers over proceedings in bankruptcy.

Sabin v. *Larkin-Green Co.*, 218 Fed. 984.

A proceeding in bankruptcy is an equitable proceeding, and the court has all the inherent powers of a court of equity to enforce and protect its jurisdiction.

In re Swofford Bros. Dry Goods Co., 180 Fed. 549.

A bankruptcy court has the plenary powers of a court of equity, and can exercise the powers of such a court for the ascertainment and enforcement of the rights and interests of the various parties interested in the estate of the bankrupt company.

Bardes v. *Hawarden Bank*, 178 U. S. 524; 20 Sup. Ct. Rep. 1000.

Dodge v. *Norlin*, 133 Fed. 363.

In re Siegel-Hillman's Dry Goods Co., 111 Fed. 980.

In dealing with partnership matters, a court of bankruptcy is vested with full equity powers.

In re Filmar, 177 Fed. 170.

In determining an issue of fraud, a court of bankruptcy is governed by the rules of courts of equity.

In re Hawks, 204 Fed. 309.

An adjustment of equities between creditors arising out of the provisions of the Bankruptcy Act is peculiarly within the rule governing bankruptcy powers.

In re Siegel-Hillman Dry Goods Co., 111 Fed. 980.

In 7 C. J. 27, it is said:

"The administration and distribution of the property of a bankrupt is a proceeding in equity, and when authorized by Act of Congress it becomes a branch of equity jurisprudence. Accordingly a District Court sitting in bankruptcy can exercise the full powers of a court of equity for the ascertainment and enforcement of the rights and equities of the various parties interested in the bankrupt estate."

Citing—

Bardes v. *Hawarden, etc., Bank*, 178 U. S. 524; 20 Sup. Ct. Rep. 1000.

In re Gillaspie, 190 Fed. 88.

In re Swofford Bros. Dry Goods Co., 180 Fed. 549.

Mason v. *Wolkowich*, 150 Fed. 699; 10 L. Rep. Ann. N. S. 765.

In re Rochford, 124 Fed. 182.

Swarts v. *Siegel*, 117 Fed. 13.

III.

(a) "HE WHO SEEKS EQUITY SHOULD DO EQUITY." "HE WHO COMES INTO EQUITY SHOULD DO SO WITH CLEAN HANDS."

(b) THE CIRCUIT COURT OF APPEALS BASED ITS DECISION UPON THE TECHNICAL RULES OF SET-OFF.

THE OFFICIAL RELATION OF TRUST OF THE DEPOSITORY TO THE BANKRUPT ESTATE AND THE BREACH OF THAT TRUST BY THE DEPOSITORY, WERE NOT CONSIDERED AS AFFECTING THE STATUS OF THE CLAIM OF THE DEPOSITORY NOR TO JUSTIFY THE DISTRICT COURT IN IMPOSING CONDITIONS TO PREVENT ITS PARTICIPATION IN THE ASSETS OF THE BANKRUPT ESTATE UNTIL IT HAD MADE RESTORATION OF THE MISAPPROPRIATED FUND OF THE ESTATE.

(c) ITS DECISION PERMITS THE DEPOSITORY WHICH HAS BREACHED ITS TRUST TO ASSERT ITS CLAIM AGAINST THE BANKRUPT ESTATE AND PARTICIPATE IN THE REMAINING ASSETS WITHOUT REQUIRING IT TO MAKE RESTORATION EVEN TO THE EXTENT OF ALLOWING THE COUNTER CLAIM

OF THE BANKRUPT ESTATE FOR THE TRUST FUNDS OF THE ESTATE WHICH WERE CONVERTED BY THE DEPOSITORY TO BE SET-OFF AGAINST THE CLAIM OF THE DEPOSITORY.

(d) THE EFFECT OF THEIR DECISION IS THAT THE RECEIVER OF THE ERRANT DEPOSITORY WILL BE PAID ITS CLAIM IN FULL WHILE THE BANKRUPT ESTATE WHICH HAS SUFFERED THROUGH THE DEPOSITORY'S BREACH OF TRUST WILL RECEIVE LESS THAN FIFTY PER CENT OF ITS COUNTER CLAIM. WE BELIEVE THIS IS BOTH LEGALLY AND MORALLY WRONG.

(e) SUCH A RECREANT OFFICER SHOULD NOT BE PERMITTED TO ASSERT A CLAIM IN THE COURT THAT APPOINTED IT AGAINST THE REMNANT OF THE VERY ESTATE IT HAS LOOTED AT LEAST NOT UNTIL IT HAS MADE RESTORATION OF THE MISAPPROPRIATED FUNDS, NOR SHOULD THAT RESTORATION (WHERE THE CIRCUMSTANCES PERMIT IT TO BE WORKED OUT THROUGH THE MEDIUM OF A SET-OFF) BE MADE CONDITIONAL UPON WHETHER THERE WOULD BE A TECHNICAL RIGHT OF SET-OFF IF THE CASE WERE AN ORDINARY ACTION AT LAW, i. e., WHETHER THERE IS STRICT MUTUALITY.

Of course, the situation in the case at bar is much stronger than in *in re Bologh* or in *Morris* v. *Carnegie Trust Co.* The question in this case is *not* whether the Trustee's deposit is entitled to priority nor whether its payment, as in this case, would create a preference not justified by the Illinois Banking Law.

The District Court in this proceeding was not administering the affairs of the LaSalle Street Trust & Savings Bank, and is not attempting to decide or determine the rights of creditors under the Illinois Banking Law. The situation is an entirely different one. The Court of Bankruptcy is administering the bankrupt estates entrusted to its care. It had previously appointed the LaSalle Street Trust & Savings Bank a depository, and therefore, a special relationship existed between the court and the depository and the depository by that appointment became an officer or a quasi officer of the Court. Under

these circumstances, if the Bank had not gone into the hands of a Receiver but had itself filed its claim with the District Court and at the same time refused to account to the Court for the funds of the bankrupt estate deposited with it by the Trustees, what would the Court have done?

When the Receiver voluntarily came into the District Court *and invoked its aid to pay a claim due the depository*, without offering to restore the funds the depository had misappropriated the District Court had the opportunity presented to it (which the District Judge, as well as the Referee did not hesitate to take advantage of) of dealing out justice to its depository without the trouble of instituting proceedings, summary or otherwise.

The fact that a Receiver had been appointed for the depository does not change the situation. The Receiver of a corporation in Illinois has no greater rights than the corporation itself. (*re Public Life Insurance Co.* v. *Swigert*, 135 Ill. 150.) The Receiver stands in the shoes of the depository. The District Court thereby acquired jurisdiction of the person of the Receiver, and, of course, of the subject matter (the claim), and should, it seems to us, have the right to deal with the claim by the application of equitable principles.

The principle that "He who seeks equity must do equity" unquestionably warranted the Bankruptcy Court (which is a Court of equity) in imposing, as a condition precedent to the allowance of the claim of the depository (or its Receiver) the restoration of the funds of the bankrupt estate which the depository had wrongfully converted. Whatever the right or power of the District Court may have been to reach out and bring in the Receiver against his protest, it is not necessary to decide in this case. The Receiver came into the District Court voluntarily and submitted to its jurisdiction (in re

Harper, 175 Fed. Rep. 412), and having done so, the subject matter of the claim and the whole relationship of the depository to the bankrupt estate was before the District Court for determination even if it be conceded that the District Court was helpless, and had no power to bring its Depository before it in a summary way (a proposition we would *not* concede). To say that under such circumstances the District Court is powerless to deal with its own depository appointed by its own order, and must pay out the funds of the very estate which the depository has misappropriated without having the right to require the depository to make restoration, creates a situation which shocks the sense of a layman and ought to shock the conscience of a Chancellor whose conscience is supposed to be more enlightened and more accustomed to recognizing equities.

That a Court of Bankruptcy administers its estates in accordance with equitable principles and is in reality a court of equity, is too well settled to be controverted. The Circuit Court of Appeals exercises a power to a review, which is intended to be controlled by equitable principles. In fact, courts of bankruptcy are in reality courts of equity.

We venture to assert that if the depository (or its Receiver) had filed this claim against the estate of the O'Gara Coal Company, and it had developed upon the hearing of its claim that it had misappropriated the funds of some other bankrupt estate or a number of bankrupt estates, the District Court had the power (or ought to have the power if it has not) to say to the depository (or its Receiver),—"This Court will not entertain your claim against the bankrupt estate of the O'Gara Coal Company so long as you are in default as a depository of this Court, and until you make restoration of the funds of all the other estates which you have misappropriated

this Court will not recognize you as a claimant in any bankrupt estate which this court is administering." Is there any improper exercise of power in a situation of that kind? To say that such an order would be an abuse of power is to hold virtually, and to all intents and purposes, that the appointment of a depository has no particular significance, that the depository is not an officer of the court, nor is it subject to the order or direction of the court; in fact, the whole proceeding in which it is appointed is more or less farcical. It means that the depository is not a part of the machinery of the Bankruptcy Act for the administration of bankrupt estates under the supervision of the court.

What would a Bankruptcy Court do if a receiver or a trustee misappropriated funds of the bankrupt estate? Would it hesitate to punish it or to impose conditions if the defaulting officer of the court had the temerity to appear in court and ask the aid of the court to collect a debt due the defaulting officer? Would the court not feel that it was adding insult to injury if a defaulting receiver came into the bankruptcy court and asked it to allow his claim against the bankrupt estate for compensation or otherwise, when he had misappropriated part of the funds of that very estate, without offering or requiring him to make restoration? It is such an elementary proposition that it does not appear to require any extended argument. Either the depository is an officer of the court or the appointment has no significance whatever. In that event, the provisions of the Bankruptcy Act might as well be disregarded. If the only effect of those provisions is to obtain a bond from the bank, it is apparent they fall short of safeguarding the funds of bankrupt estates. While the Bankruptcy Act authorizes the District Courts to increase the bond of the depository from time to time, such bonds are never sufficient to

cover the amount of the deposits. Take for instance the case at bar. The bond of the depository was $50,000, only a small fraction of the funds of bankrupt estates entrusted to it. It was so small in proportion to the amount of bankrupt funds deposited that the amount it would yield hardly justified the expense of enforcing the claim.

But to return to the relation occupied by the depository toward the court. Without regard to the question whether courts which are charged with the administration of bankrupt estates can protect the funds of bankrupt estate entrusted to their care by punishing a depository that has betrayed its trust, is it possible that it is helpless when the depository actually asserts a claim against the same estate, the court must sit with its hands tied *and pay out the remainder of the funds looted estate to the depository*, without having the power to require it to restore what it has already wrongfully taken.

While the order of the Referee in this case was in the form of a set-off, its effect is precisely the same as though the court had said to the depository,—"I will allow your claim upon condition that you restore the funds you have already taken and failed to account for."

If the court is powerless to impose this condition, whether in the form of a set-off or otherwise, the legal effect is that the depository can say to the court "I insist that I be paid the full amount of my claim without regard to my previous wrongdoing, and I will not credit (and the court cannot compel me to credit) upon my claim the moneys which the court has entrusted to me, belonging to the estate, and which I have misappropriated."

Stated differently, the respondent says "I am going to keep what I got (wrongfully) and the court cannot take it away from me; in fact, the court cannot touch it, al-

though I am a court officer, *but I insist the court pay me what the court owes me, notwithstanding my wrongful acts toward the court and toward its estates.*"

To deal with that situation upon the basis of the principle of legal set-off, as the Court of Appeals in this case, and say that the order is erroneous merely because the depository could not have paid itself the amount of its claim out of the funds of the bankrupt estate seems to us so superficial that it is startling. THE DECISION OF THE COURT OF APPEALS EFFECTS A RESULT WHICH IS PERPETUATING A WRONG INSTEAD OF RIGHTING IT.

Any course of reasoning by which the conclusion is reached that the Court of Bankruptcy is obligated to pay the insolvent depository's receiver the amount of its claim out of the funds of the bankrupt estate, without the right to require the depository (or its receiver) to restore to the bankrupt estate the funds it had misappropriated, seems not only thoroughly unsound, but both legally and morally wrong. Any moneys that may be paid on account of the claim of the depository, filed in the bankruptcy proceedings, will come out of the bankrupt estate (and thus further deplete it) and go into the insolvent estate of the depository.

On the other hand, any moneys which may be paid on the deposits by the Trustee in Bankruptcy (which belong to the bankrupt estate) will be paid out of the insolvent estate of the depository and go into the bankrupt estate. If mutuality is to be the controlling principle in a situation of this kind (merely because the Court's order deals with it through the medium of a set-off, which is purely a means to an end) it seems to us that there is actual mutuality, but we must urgently insist that it is not a situation which should be dealt with purely from the standpoint of principles governing an ordinary set-off at law.

To deal with it on that basis is to ignore the real purpose of the order *which is to right the wrong done to the bankrupt estate, not by punishing the offender but by applying equitable principles as a condition to grant relief to the offender.* If the depository were an individual, he could probably be punished criminally for the act of converting the trust funds of the bankrupt estate. The depository being a corporation, cannot be punished in that way, but through the fortuitous circumstance of its having a claim against the bankrupt estate, the Court of Bankruptcy, when it comes in to ask payment of its claim, is in the position of being able not to punish it but to apply the equitable principle, "He who seeks equity must do equity" by requiring the claimant to restore what it has wrongfully taken.

This is the proper aspect in which the order of the District Court should be viewed. Courts of equity are in the habit of disregarding form and looking to the substance, —the end to be accomplished.

The order of the District Court meets that test. It accomplishes the ends of justice. IT IS RIGHT IN EVERY RESPECT, *and to set it aside* (as the Circuit Court of Appeals has done in this case) *is to perpetuate a wrong which can never be righted in any forum.*

To deal with it in accordance with the rules of set-off, by the application of the principle of mutuality, is, it seems to us, a most unfortunately narrow view, *the effect of which is to not only entirely ignore (and thus condone) the criminal act of the depository, but to actually reward the wrongdoer by permitting it to take more of the same estate wthout giving up what it has already taken wrongfully!*

THIS CASE AFFORDS AN OPPORTUNITY TO THIS COURT TO SETTLE FOR ALL TIME THE QUESTION OF THE STATUS, DUTIES AND

RESPONSIBILITIES OF THE DEPOSITORIES UNDER THE BANKRUPTCY ACT, AND THEIR RELATIONS TO THE COURT, AND THE COURT'S POWER (OR LACK OF POWER) TO DEAL WITH THEM.

IT IS IMPORTANT IN ORDER TO SECURE A UNIFORM AND ORDERLY ADMINISTRATION OF THE BANKRUPTCY ACT THAT THIS BE DONE.

It is bad enough under any circumstances to contemplate the loss of the funds of bankrupt estates through the failure of depositories. The provision for depository bonds is entirely inadequate, the amount of the funds of bankrupt estates on deposit being always many times the amount of the depository bond. *Therefore, the responsibilities of the depository should be determined and the power of the Court to deal with the depository should be settled.*

In this case, however, the intolerable situation arose of a depository, after having misappropriated the funds of hundreds of bankrupt estates, having the impertinence to apply to the court that appointed it to share in the remaining assets of one of those estates without being required to make restoration of what it had already taken, even from the very estate against which it was asserting the claim. It is hard to imagine a situation more elementally wrong than that created by the order of the Court of Appeals in this case, which tied the hands of the District Court and prevented it from dealing in any manner with the depository while at the same time it requires that court to hand over to the defaulting depository the remainder of the funds of the bankrupt estates to the extent necessary to pay a prior obligation of the bankrupt.

As we have already said, the situation is so intolerable that it shocks the conscience of a layman, and it seems rather ridiculous to have to present an argument to the highest court of the land to demonstrate that the order

ntered by District Judge Carpenter was not only right nder the circumstances, but was the only order a self espectiing court should consider, in dealing with a recreant Depository.

IV.

N EQUITY, MUTUALITY IS NOT ESSENTIAL TO A SET-OFF, BUT IN THIS CASE THERE IS ACTUAL AND EQUITABLE MUTUALITY.

In the Circuit Court of Appeals respondent relied largely, if not solely, on the case of *In Re United Grocery Co.*, 253 Fed. 267, decided by the District Court for the Southern District of Florida.

This decision, without binding force upon this court, is, as we shall endeavor to show, fundamentally erroneous.

The decision is predicated upon the proposition of the want of mutuality, which the court held to be conclusive of the question before the court.

In this we contend the court erred; first, because under the circumstances of the case at bar, the deposits of the moneys of the O'Gara Coal Company, bankrupt, in the bank may be applied as in the nature of a credit or payment upon the claim of the bank against the O'Gara Coal Company, for the reasons fully and conclusively set forth in *People v. California Safe Deposit & Trust Co.*, 141 Pac. (Cal.) 1181, and the other cases cited by us; and, second, because in any event mutuality is not necessary in cases where the equitable jurisdiction of the court is called into action, or, in other words, in so-called cases of equitable set-off arising from the insolvency of the party against whom the set-off is sought to be made, as in this instance, the bank.

In the case at bar, the real parties in interest are the

bankrupt estate on the one side, and the insolvent estate on the other. Originally, the real parties in interest were the bankrupt corporation on the one side, and the bank on the other. Upon the insolvency of the bank, their respective estates became the real parties in interest. The trustee of the bankrupt estate on the one hand, and the receiver of the insolvent estate on the other, are mere nominal parties, with no actual personal interest. Any moneys that may be paid on account of the claim of the bank in the bankruptcy proceedings will come out of the bankrupt estate, and go into the insolvent estate of the bank. Any moneys that may be paid on the deposits by the trustees in bankruptcy in the bank (consisting of assets and funds of the bankrupt estate) will, on the other hand, be paid out of the insolvent estate of the bank and go into the same bankrupt estate.

There is here, then, actual and equitable mutuality.

As was said in *People v. California Safe Deposit & Trust Co., supra,* where an insolvent bank was asserting its claim for payment against the estate of a decedent, and the administrator was insisting that deposits of the estate's moneys made by him with the bank after the death of the deceased, should be applied upon the claim of the bank:

> "While the respective demands may not be strictly mutual, they are very intimately connected; the claimant in effect owes the estate, and the estate owes him; both demands had relation to funds of the estate. This presents a situation where, in the interests of clear right and justice, an exception to the general rule of mutuality shall be applied and a set-off allowed."

The bank is in this bankrupt estate insisting upon its right to be paid in full out of the funds of the estate. On the other hand, with funds of the estate in its pocket, deposited with it by the trustees in bankruptcy, it is also

insisting that no part of these funds should be applied upon its claim, but that the bankrupt estate should go into its insolvency proceedings to get what it can of the funds of the bankrupt estate received and still held by it. This is, we contend, a shocking and intolerable attitude. We cannot believe that this court, having in its hands the administration of the assets of the bankrupt estate in the interests of the creditors and the bankrupt, will pay a creditor a hundred cents on the dollar out of the funds of the bankrupt estate, permit the creditor to retain, without deduction or application, funds of the estate received by him, and send the bankrupt out of its court to get what it may of these funds out of the insolvent estate of the creditor in another proceeding and court.

In principle, the rule that an executor or administrator has the right to retain the whole or a part of a legacy in discharge of a debt due from the legatee to the estate is applicable here, and, as was said in *Smith* v. *Kearney*, 2 Barb. Ch. (N. Y.) 533, 549:

> "The right to retain depended upon the principle that the legatee or distributee was not entitled to his legacy or distributive share, while he retained in his own hands a part of the fund out of which that and other legacies or distributive shares ought to be paid, or which were necessary to extinguish other claims on that fund. In other words, the legatee or distributee in such cases, seeks to obtain a portion of the fund which the testator or the letters of administration have placed in the hands of the executor or administrator to pay debts, legacies or distributive shares; while such legatee or distributee is himself debtor to the estate, and by withholding payment, diminishes the fund to that extent; and *it is against conscience that he should receive anything out of the fund without deducting therefrom the amount of that fund which is already in his hands, as a debtor to the estate.*"

And as was said in *Porter* v. *Roseman,* 74 N. E. 1105:

"*It is certainly unconscientious for an insolvent party to coerce the payment of his claim when he is owing the other party an equal or a larger sum, and thus leave the latter remediless.*"

In *Re Bell's Estate,* 141 Pac. (Cal.) 1179, the court said:

"We are satisfied that the Superior Court, sitting in probate, had the jurisdiction to entertain the defense of set-off interposed by the administratrix. It had jurisdiction of the estate of Bell and over all proceedings therein, which included a determination of whether the bank was entitled to the order for payment of its allowed claim. It had jurisdiction of the parties in that particular proceeding and over the subject-matter."

In Re Harper, 175 Fed. 412, the court says, at page 426:

"If such a claim for damages is not regarded as the subject of set-off within the meaning of Section 68a, the trustee here must go to a foreign state and bring suit, and take his chances of making collection in case of recovery.

In either case that claimant company is in this court seeking a dividend from the estate, and it seems clear to me that under the general policy, and to answer the true purpose of the law, the claim of the trustee is to be regarded and treated as an alleged debt of that company to the estate in bankruptcy, and if established off-set or counter-claimed."

And so also in *Siegel-Hillman Dry Goods Co.,* 111 Fed. at page 986, the court says:

"The ruling in this case justifies the holding that in cases wherein a court of equity is charged with the distribution of an estate or a fund under its control, and has before it the several parties whose rights and interests are involved in the administration of the estate, it may, disregarding mere matters of form, but having regard to the substantial rights of all the parties, ascertain the ultimate relation and liability of the several parties, and base its decree

thereon, thus avoiding the delay and expense which would be caused if the parties were remitted to the pursuit of their legal rights without aid of a court of equity."

Similarly, in *North Chicago Rolling Mills Company* v. *St. Louis Ore Company*, 14 Sup. Ct. Rep. 716, the court adds:

"The adjustment of demands by counter-claim or set-off, rather than by independent suit, is favored and encouraged by the law to avoid circuity of action and injustice."

In *Lindsay* v. *Jackson*, 2 Paige's Ch. (N. Y.) 580, the court said:

"A complainant ought not to be left to pursue his legal remedy against his defendants when, from their insolvency no satisfaction of his demands could be thus obtained."

In *Porter* v. *Roseman*, 74 N. E. (Ind.) 1105, the court, quoting from Barbour on Set-Off, says:

"If a court finds a case of natural equity not within the statute, it will permit an equitable set-off, if, from the nature of the claim, or from the situation of the parties, it is impossible to obtain justice by a cross-action."

In the well-considered case of *People* v. *California Safe Deposit & Trust Company*, 141 Pac. (Cal.) 1181, the court says at page 1183:

"The only effect of denying the right of set-off to the administrator in this situation would be to compel him to sue to enforce payment from the creditor if he was solvent, and this for the sole purpose of thereupon paying it back to him in satisfaction of his claim. This would be an idle and senseless thing to require a court to do. * * *

The denying of the right of set-off under these circumstances simply for want of mutuality would be not only unjust and oppressive towards the creditors, but also an idle and absurd act."

In *Receivers* v. *Paterson Gas Light Company*, 23 N. J
Law, 283, 294, the court says:

> "And there is no equality and no equity in puttin
> a debtor of the bank, who had a just and legal set-o
> as against the corporation, in a worse position, an
> the creditor in a better position by the failure of th
> bank and the appointment of receivers."

When the creditor invokes the aid of this court an
seeks payment of his claim, this court will see to it tha
the moneys of the estate which the creditor has alread
received shall be applied in payment so far as nece
sary upon the claim asserted. *It will not permit the cre
itor to get funds of the estate twice*, which would be th
situation if the receiver were permitted to prevail in th
proceeding.

The law is, as the authorities hereafter cited by
clearly show, that set-off is not strictly a defense, but
regarded as in the nature of payment to be applied
the court.

34 Cyc. 644.

As was also said in *Porter* v. *Roseman*, 74 N. E. 1105

> "In enforcing an equitable set-off, the court pr
> ceeds upon the principle that one demand is *pro tan*
> a satisfaction of the other, *and that the real indeb
> edness is merely the balance*."

Other cases will be cited by us to the same effect.

In *Chandler* v. *Drew*, 6 N. H. 469; 26 Am. Dec. 704, it
said, on page 707:

> "Strictly speaking, a set-off is not a defense. Wh
> a set-off is made, mutual claims, to an equal amou
> on each side, become, under the statute, a satisfa
> tion of each other. They operate as a payment
> each other. When the claim of the plaintiff is whol
> paid by a set-off, the action is at an end, and he ma
> be liable to costs. But his claim has not been d
> feated by a defense, but has been paid by the exti

guishment of claims against him, to an equal amount. And, with the exception of the cases to which we have just adverted, no case has occurred to us in which a set-off has ever been considered as a defense, within the meaning of the rule, on which the decisions in those cases rest."

The bank has once been paid out of the funds of the bankrupt estate to the extent of the deposits of the moneys of the bankrupt estate received by it.

As a matter of fact, the rights of the parties are mutual and reciprocal, as is shown by *People* v. *California Safe Deposit & Trust Company, supra.*

Suppose the bank had not become solvent and had come into the bankrupt estate for an order to require the trustee to pay its proved claim, can there be any doubt that the trustees would have had the right to deduct from the claim or apply upon it the deposits which the trustee had made in the bank? The trustee would clearly have had this right.

As in the case of *People* v. *California Safe Deposit & Trust Co., supra*, the many other cases cited by us hereafter show this right on the part of the trustee was not affected or taken away by the insolvency of the bank, but continued to exist, since it is settled that the receiver stands merely in the shoes of the bank, and takes subject to all equities against it.

It is, of course, well settled that when a bank becomes insolvent, its depositor may avail himself in set-off against his indebtedness to the bank of any indebtedness of the bank to himself, as, for example, the balance due him on his deposit account.

Morse on Banks (4th Ed.), Par. 338, and cases cited.

On the other hand, when the bankrupt estate became solvent and able to pay one hundred cents on the dollar

to its creditors, the bank, and upon its solvency, its re-ceiver, had a reciprocal right to set off its allowed claim against the bankrupt estate in any suit or proceeding brought against it to recover the debt due the bankrupt estate, or its trustee, on account of the deposits of the moneys of the bankrupt estate in the bank, such debt therefore, representing assets of the estate. This was squarely held in *People v. California Safe Deposit & Trust Co., supra,* and for reasons therein set forth, to which repetition we call the court's attention.

In the present circumstances of this case, therefore which are now, at the time payment by the bank is de-manded, controlling, we insist that the bankrupt estate having become solvent, all necessary mutuality and reci-procal rights exist, as we have pointed out.

The court *In re United Grocery Co.,* we contend, there-fore, was in error in saying that neither the bank nor its receiver could have applied the deposit to the payment of the debt owed the bank by the bankrupt, nor the trustee of the bankrupt apply the deposit to the discharge *pro tanto* of the debt of the bank.

But even if this were so, it is not determinative because any such want of mutuality became immaterial upon the insolvency of the bank, giving rise to an equitable set-off whether mutuality existed or not, as we shall hereafter fully show. This element the court wholly overlooked.

But beyond these considerations, and without reference to them, the insolvency of the bank gave rise to the right to invoke the equitable jurisdiction of this court, in which the court's action is not limited by technical legal rules and in which the court disregards the form and looks to the substance, and will grant relief notwithstanding want of mutuality, and a difference in the capacity of the par-ties, so long as the same substantive rights and interests are to be affected.

The cases cited by us will fully sustain this contention. Thus, in *People* v. *California Safe Deposit & Trust Co.*, *supra*, the court, among other things, said:

> "The creditor may be insolvent, and it is well settled that the insolvency of a party against whom a set-off is claimed constitutes a sufficient ground for the allowance of a set-off not otherwise available."

A court of equity is concerned with actual mutuality and not with technical legal mutuality, whenever the circumstances, such as insolvency, give rise to its intervention.

As was said in *Brewer* v. *Norcross*, 17 N. J. Eq. 219, 225:

> "They (courts of equity) look beyond the form of the contract to its real character, and beyond the nominal parties to the parties to be affected by the decree."

In Waterman on Set-Off, Par. 218, it is said:

> "By mutual debts between the parties is meant the real and not merely the nominal plaintiff and defendant."

And, as was said in *Hughes* v. *Traherne, Admx.*, 64 Ill. 48:

> "The doctrine is that a court of equity in cases of insolvency will regard the real parties in interest and allow a set-off of demands in reality mutual, although prosecuted in the name of others nominally interested."

We later cite and quote from many other cases to the same effect.

The court in *In Re United Grocery Co.*, 253 Fed. 267, wholly ignored the element of the bank's insolvency, giving rise to the equitable jurisdiction of the court in the matter of set-off, and in this it erred.

The case of *People* v. *California Safe Deposit & Trust*

Co., in which the circumstances were essentially identical with those in the case at bar, and the cases hereafter cited by us will, we believe, clearly disclose the fallacy of the reasoning and holding of the court *In Re United Grocery Co.*

In brief, our contention is that the insolvency of the bank has totally changed the situation, and has created a case in which, in the exercise of its unquestionable equity jurisdiction, this court should grant the relief allowed by the referee. This is also and for greater reason true, because of the additional circumstance of the solvency of the O'Gara Coal Company.

Again, in *In Re Grocery Co.*, the conclusion of the court seemed to be controlled to some extent by the fact that if the bankrupt were permitted to take credit for the amount of deposits made in the bank by the trustees, the bankrupt might thereby be enabled to get a larger ratable payment on its claim against the insolvent estate of the bank than the other creditors of the bank. This is also earnestly urged by counsel for appellant in the case at bar. This, we submit, is wholly immaterial to this court, as the cases to which we will later call the court's attention clearly and conclusively point out.

Thus see:

> *Scott* v. *Armstrong*, 146 U. S. 499; 13 Sup. Ct. Rep. 148,

where this very contention was urged in the case of the liquidation of a national bank, and overruled.

See also:

> *Smith* v. *Perry*, 95 S. W. (Mo.) 337.
>
> *Receivers* v. *Paterson Gas Light Co.*, 23 N. J. Law, 294.
>
> *St. Paul & Minn. Trust Co.* v. *Leck*, 57 Minn. 87; 58 N. W. 826.

People v. *California Safe Deposit & Trust Co.*, 141 Pac. (Cal.) 1181.
C. D. & V. R. R. Co. v. *Field*, 86 Ill. 270, 272.
Porter v. *Roseman*, 74 N. E. (Ind.) 1105.

V.

A COURT OF BANKRUPTCY WILL EXERICSE THIS EQUITABLE JURISDICTION IN THE MATTER OF EQUITABLE SET-OFFS IN ALL CASES COMING BEFORE IT IN WHICH A COURT OF CHANCERY WOULD EXERCISE SUCH JURISDICTION.

This was clearly held in *Cumberland Glass Manufacturing Company* v. *DeWitt*, 237 U. S. 447; 35 Sup. Ct. Rep. 636, in which the court said:

> "The matter (of set-off) is placed within the control of the bankruptcy court, which exercises its discretion in these cases *upon the general principles of equity*."

And Chief Justice White, in elaborating upon this statement in his dissenting opinion, said:

> "It is equally indisputable, as long since settled by this court, that in exercising its powers when occasion requires it, as between all or any of the items of the active or passive side of the bankrupt estate, *it is the duty of the court of bankruptcy not merely to determine the right of set-off by strict common law principles, but to govern the subject by the broad doctrines of set-off as administered by courts of equity*."

Courts in bankruptcy or insolvency proceedings, charged with the duty and vested with the power of marshalling estates, settling the rights and interests of creditors and others therein, and making distribution of the same, have always been regarded as possessing inherent equitable power from the very nature of their jurisdiction outside of, or even in the absence of any statute.

This is clearly shown by the elaborate and well-considered case of *Receivers* v. *Paterson Gas Light Company*, 23 N. J. Law 283-288, to which we invite the court's special attention.

In this case the court held that the receivers of an insolvent bank are not regarded as purchasers for a valuable consideration, but take the property of the corporation in precisely the same plight and condition and subject to the same equities as they were held by the corporation, and that, in consequence, a debtor of an insolvent bank, whether his indebtedness has actually accrued or not at the time of the insolvency, may set-off against his indebtedness to the receivers, either the deposit in the bank or bills of the bank held by him at the time the bank passed into the hands of the receivers. In so holding the court, in part, said:

> "It seemed to be assumed upon the argument, by the counsel, that the equitable doctrine of set-off, as applied in cases of bankruptcy, is founded upon the expressed provisions of the statutes, and it is certainly true that all modern bankrupt laws contain a provision that, in all cases where there are mutual debts or mutual credits, the balance only shall be deemed the true debt, and the rest of the claim shall be deemed adjusted by the set-off. And the fact that all well considered bankrupt laws do contain so broad a provision in favor of set-offs, is in itself the strongest authority in support of the natural equity and justice of the provision.
>
> *It is equally true, however, that the jurisdiction of equity over set-offs in cases of bankruptcy and the practice of allowing them, was not derived from the authority of the statute, but was exercised by the courts long prior to the introduction of the provision into the statute.*

The general right of set-off was first introduced in the bankrupt law in the year 1708, by the statute IV Anne, cap, 17; but the course of adjusting the balance was adopted in practice as early as 1675. Thus in 28 Car. 2 (1675) Lord North said: 'If there are

accounts between two merchants and one of them becomes bankrupt, the course is not to make the other pay the whole that was originally intrusted to him, and to put him, for the recovery of what the bankrupt owes him, into the same conditions with the rest of the creditors, but to make him pay that only which appears to be due to the bankrupt on the foot of the account.' 1 Modern 215."

And again the court said (page 290):

"The English statute authorizing set-off in bankruptcy, is not only earlier in point of time, but is broader in its provisions than the general statute of set-off. The greater extent to which the doctrine has been carried in cases of bankruptcy, is doubtless owing to the clear natural equity of the practice *and the obvious injustice of compelling one of two parties, mutually indebted, to pay his entire debts, and then to receive only a dividend, with the other creditors, upon his own claim.*

The same equitable principle has been uniformly applied under the insolvent laws, where the statute is silent in regard to set-off. Neither our statute abolishing imprisonment for debt nor the statute regulating the distribution of the estate of insolvents nor that respecting assignments by debtors for the benefit of creditors, contains any provision in respect to set-off, and it is clear, that in an action by an assignee under an assignment made for the benefit of creditors, there could be no set-off *at law*. Yet the uniform construction of the statute has been that the debtor of the insolvent is entitled to the same allowance by way of set-off against the claims of the assignee, that he would have been against the insolvent himself."

The same was clearly recognized and stated in *Scott* v. *Armstrong*, 146 U. S. 499; 13th Sup. Ct. Rep. 148.

That was a case of the insolvency of a national bank. The statute under which national banks are organized and governing their liquidation in case of insolvency makes no provision for set-off or counter-claim.

It was contended that the court in the administration

of the estate of the insolvent bank under the National Bank Laws could not recognize or allow a set-off or counter-claim, and that to do so would be against the policy of the Act and the law, in that it might give one creditor a greater payment than another and thus prevent a ratable distribution among the creditors. The Supreme Court, however, held that in the administration of the insolvent estate the equitable doctrine of set-off would be recognized and enforced, and in that connection said:

> "As pointed out by counsel, the Bankruptcy Act of 13 Eliz. C. 70, contained no provision in any way directing a set-off or the striking of a balance, and by its second section commissioners in bankruptcy were to seize and appraise the lands, goods, money and chattels of the bankrupt, to sell the lands and chattels, 'or otherwise to order the same for true satisfaction and payment of the said creditors, that is to say, to every of the said creditors, a portion, rate and rate alike, according to the quantity of his or their debts.' 4 Statutes of the Realm, pt. 1, 539. Yet, in the earliest reported decisions upon set-off it was allowed under this statute. Anonymous, 1 Modern, 215; *Curson* v. *African Company*, 1 Vern. 121; *Chapman* v. *Derby*, 2 Vern. 117.
>
> The succeeding statutes were but in recognition, in bankruptcy and otherwise, of the practice in chancery in the settlement of estates and it may be said that in the distribution of the assets of insolvents under voluntary or statutory trusts for creditors, the set-off of debts due has been universally conceded. *The equity of equality among creditors is either found inapplicable to such set-offs or yields to their their superior equity.*"

In this connection we ask your Honors to consider the case of *In re Bell's Estate*, 141 Pac. (Cal.) 1179, which in principle and by analogy is applicable to the case at bar.

In that case a decedent was indebted to a bank at the time of his death, and, during the course of the administration of his estate, a portion of the debt was paid by the

administratrix leaving a balance unpaid. During the course of the administration of the estate, also, the administratrix deposited funds of the estate in her name in the bank, and thereafter the bank became insolvent and a receiver was appointed. The receiver thereupon filed a petition in the Probate Court for an order to require the administratrix to pay the balance of the debt due the bank from the estate, and the administratrix, in answer to this petition, set up the fact of the deposits by her as administratrix in the bank in excess of the balance due the bank from the estate, and asked that such deposits be set off against such balance, and that it be adjudged that at the date of the bank's insolvency there was owing from the bank to the administratrix a balance of $5,200.

This application of the administratrix was denied by the Probate Court on the ground "that the court sitting in a probate matter had no jurisdiction to entertain the counter-claim or set-off pleaded by the said administratrix in her amended answer"; and, therefore, ordered that the balance unpaid to the bank be paid by the administratrix out of the funds of the estate in her hands.

On the appeal of the administratrix, the Supreme Court of California held that the Probate Court had the inherent equitable jurisdiction to entertain the defense of set-off interposed, and in so holding, the court said:

> "Now, as to the question of jurisdiction. We are satisfied that the Superior Court, sitting in probate, had jurisdiction to entertain the defense of set-off interposed by the administratrix. It had jurisdiction of the estate of Bell and over all proceedings therein which included a determination of whether the bank was entitled to the order for payment of its allowed claim. It had jurisdiction of the parties in that particular proceeding and over the subject matter. It is true that the Superior Court, sitting in probate, is limited in its jurisdiction to the extent that it must

> follow the mode of procedure provided by statute in the administration of the estate of a decedent, and can only determine those questions or matters arising in the estate which it is authorized to do. Here the question whether a creditor is or is not entitled to an order for payment of his allowed claim arose in the proceeding in the administration of the estate. It was a controversy arising in the estate itself, and involved the right of the creditor to share in its assets, and was a question which the court, sitting in probate, was authorized to determine. The fact that, acting in probate. It may be called upon to apply legal or equitable rules or principles in considering a question it is called upon to determine does not affect its jurisdiction to do so. The Superior Court, sitting in probate, is a court of general jurisdiction, and in determining any question arising in the administration of an estate which it is expressly authorized to decide, it may bring to its aid the full equitable and legal powers, with which, as the Superior Court, it is invested."

This was manifestly held to be true on identically the same principle that courts of bankruptcy or other courts having power to administer and distribute bankrupt or insolvent estates possess this power.

And as we later point out, the Supreme Court of California in another branch of this litigation arising between the same parties and involving the same matter in the bank's receivership proceeding expressly held that the administratrix was entitled to the set-off claimed by her.

> See *People* v. *California Safe Deposit & Trust Company*, 141 Pac. (Cal.) 1181.

VI.

COURTS OF EQUITY EXERCISE A JURISDICTION IN MATTERS OF SET-OFF INDEPENDENT OF THE STATUTES ON THE SUBJECT.

See 34 Cyc. 633, for a general statement of the proposition.

In *Scott* v. *Armstrong*, 146 U. S. 499, 13 Sup. Ct. Rep. 148, the court said:

> "The right to assert set-off at law is of statutory creation, *but courts of equity from a very early day were accustomed to grant relief in that regard independently as well as in aid of statutes upon the subject.*"

See also:

North Chicago Rolling Mills Co. v. *St. Louis Ore Co.*, 14 Sup. Ct. Rep. 715.

Lindsay v. *Jackson*, 2 Paige's Chan. (N. Y.) 580.

Receivers v. *Paterson Gas Light Co.*, 23 N. J. Law 283.

Smith v. *Perry*, 95 S. W. (Mo.) 337.

Eigenman v. *Clark*, 51 N. E. (Ind.) 725, p. 726.

Blake v. *Langdon*, 47 Am. Dec. 701, p. 705, 19, Vt. 485.

Richardson v. *Doty*, 62 N. W. (Neb.) 254.

Jeffries v. *Evans*, 43 Am. Dec. 158, 6 B Monroe (Ky.) 119.

VII.

A PARTY WHO FILES A CLAIM AS A CREDITOR IN A BANKRUPTCY PROCEEDING SUBMITS TO THE JURISDICTION OF THE COURT ALL QUESTIONS AS TO THE RIGHT OF SET-OFF IN BEHALF OF THE BANKRUPT ESTATE AGAINST SUCH CLAIM.

In re Harper, 175 Fed. 412-424.

In this case the creditor filed his claim, which was practically admitted to be correct. Thereafter the trustee asserted a counter-claim or set-off in the nature of an unliquidated claim for damages growing out of false and fraudulent representations made by the creditor to the bankrupt, and also growing out of a breach of contract on the part of the creditor with the bankrupt.

It was first objected that this set-off could not be allowed, because it was an unliquidated claim for damages.

The court held that such a claim came within the scope of Section 68, as a debt due from the creditor to the bankrupt.

The court also held (pp. 425-426) that the creditor "having come into this court with its claim, it is either made a party to the bankruptcy proceedings here, or has instituted a proceeding in bankruptcy—probably the latter—and hence must submit to the liquidation of the claim for damages as a set-off."

The court also said (p. 426):

> "If such a claim for damages is not regarded as the subject of off-set within the meaning of Section 68a, the trustee here must go to a foreign state and bring suit, and take his chances of making collection in case of recovery.
>
> In either case the claimant company is in this court seeking a dividend from the estate, and it seems clear to me that under the general policy and to answer the true purpose of the law, the claim of the trustee is to

be regarded and treated as an alleged debt of that company to the estate in bankruptcy, and, if established, off-set or counter-claimed. There is no legal or equitable principle upon which it can be held that the creditor shall pay such claims for damages in full, if established, for the benefit of the estate, taking his percentage thereof by way of dividend on his claim when, if such claim for damages had been reduced to judgment against him prior to bankruptcy, he would be entitled to wipe it out in whole or in part by off-setting his claims against the bankrupt under Section 68a."

This was clearly an exercise of the equitable jurisdiction of the court, since at law such unliquidated claims cannot be set off, although they can be in equity.

In re Siegel-Hillman Dry Goods Co., 111 Fed., at page 986, the court said:

"The ruling in this case justifies the holding that in cases wherein a court of equity is charged with the distribution of an estate or a fund under its control and has before it the several parties whose rights and interests are involved in the administration of the estate, it may, *disregarding mere matters of form, but having regard to the substantial rights of all the parties*, ascertain the ultimate relation and liability of the several parties, and base its decree thereon, thus avoiding the delay and expense which would be caused if the parties were remitted to the pursuit of their legal rights without aid from a court of equity. Cases in bankruptcy, such as that now before the court, are peculiarly within this rule, and call for the exercise of the full powers of the court for the ascertainment and proper enforcement of the equities of the parties, for in no other proceeding can these equities be so well determined and protected as in the bankruptcy proceedings wherein the court is called upon to enforce the provisions of the act, which provisions largely control the rights of the parties."

VIII.

IT IS A RULE UNIVERSALLY RECOGNIZED AND APPLIED THAT THE INSOLVENCY OF THE PARTY AGAINST WHOM THE SET-OFF IS SOUGHT GIVES RISE TO THE EQUITABLE INTERVENTION OF A COURT OF CHANCERY, AND EQUITABLE SET-OFF WILL BE ALLOWED, EVEN THOUGH NOT ALLOWABLE AT LAW OR UNDER THE STATUTES.

IN SUCH CASES A WANT OF MUTUALITY, OR THE FACT THAT THE CLAIM SOUGHT TO BE SET-OFF IS UNLIQUIDATED, OR THAT THE PARTIES ARE SUING IN DIFFERENT CAPACITIES, THE REAL INTERESTS, HOWEVER, BEING THE SAME, AND OTHER OBJECTIONS PREVENTING THE SET-OFF AT LAW WILL NOT PREVENT AN EQUITABLE SET-OFF.

On page 638 of 34 Cyc. it is said:

"*The insolvency of the party against whom the set-off is claimed is, as a broad general rule, held to be such a special equity as will induce a court of equity to take jurisdiction to allow the set-off.*"

On page 717 it is said:

"While the general rule is stated to be that a claim cannot be set off if it is in favor of or against a third person not a party to the action, other cases qualify the rule and hold that by the term 'parties' is meant not merely the nominal plaintiff and defendant, but the real parties in interest, and that the court will go ouside of the record to find the real party; and thus it is very generally held that a claim against the party having the real beneficial interest in the cause sued on, although not a party to the record, may be set-off or counter-claimed, and in cases where a judgment ought not to be obtained against plaintiff for the excess over the debt sued on, so much of the set-off is allowed as will extinguish the claim. Thus in a suit by a trustee, defendant may set off a debt due him from the *cestui que trust*, and, conversely, in an action against a *cestui que trust*, he may set off a claim, the legal title to which is in the trustee, and a third party for whose benefit a simple contract has been entered into for a valuable consideration may plead it by way of set-off."

On page 724 it is said:

"But it is held as a general rule that in equity, as at law, the right of set-off is reciprocal, and only mutual claims and such as are in the same right can be set off. But this doctrine of mutuality is not permitted to work an injustice, for whenever it is necessary to effect a clear equity or to prevent an irremediable injustice the set-off will be allowed, in equity, although the debts are not mutual and the set-off, therefore, one which a court of law would not be authorized to make, and equity, disregarding the form, and looking to the substance of a transaction, may allow a set-off although not between the nominal parties, but between the real parties in interest, and thus in reality mutual, although not nominally so, if equity demands the set-off. Thus upon a showing of insolvency, equity will set off a debt without regard to strict mutuality or whether the debts are due on the same right, and in cases of joint credit given on account of individual indebtedness or where the joint debt is a mere security for the separate debt of the principal, the equity is obvious, and a set-off will be allowed, and, although the general rule in equity, as at law, is that joint and separate debts cannot be set off against each other, wherever it is necessary to effect a clear equity, or to prevent irremediable injustice, the set-off or joint and separate debts will be allowed, and, upon proof of insolvency, a joint debt may be set off against a several debt, and conversely."

Thus in *North Chicago Rolling Mills Company* v. *St. Louis Ore Company*, 14 Sup. Ct. Rep. 710-716, the court said:

"By the decided weight of authority, it is settled that the insolvency of the party against whom the set-off is claimed is a sufficient ground for equitable interference."

And the court accordingly further said that although at law an unliquidated claim cannot be set off, yet

"cross demands and counter-claims, whether arising out of the same or wholly disconnected transactions

and whether liquidated or unliquidated may be enforced by way of set-off whenever the circumstances are such as to warrant the interference of equity to prevent wrong and injustice."

And again:

> "The adjustment of demands by counter-claim or set-off, rather than by independent suit, is favored and encouraged by the law to avoid circuity of action and injustice."

And so, in *Central Appalachian Company* v. *Buchanan*, 90 Fed. 454, Mr. Justice Lurton, after an exhaustive review of the authorities, says, on page 461:

> "Neither would it seem is the equitable right of set-off limited to credits strictly mutual, *if insolvency exists.*"
>
> *North Chicago Rolling Mill Company* v. *St. Louis Ore & Steel Co.*, 152 U. S. 596, 14 Sup. Ct. Rep. 710.
>
> "That the claim of the appellant, the Central Appalachian Company, is unliquidated is no objection in a court of equity if insolvency exists. Under such circumstances the court will restrain the enforcement of the demand against which the set-off is to be applied until the cross-demand can be liquidated. (Citing authorities.)

A very concise and complete statement of the rule is found in *Brewer* v. *Norcross*, 17 N. J. Eq. 219-225, as follows:

> "The general rule in equity as well as at law is, that joint and separate debts, or debts accruing in different rights cannot be set-off against each other. At law, under the statutes of set-offs, the rule is inflexible; but in equity, special circumstances give rise to exceptions. Courts of equity exercise a jurisdiction in matters of set-off independent of the statute upon the subject. *They look beyond the form of the contract to its real character; and beyond the nominal parties to the parties to be affected by the decree.* Wherever it is necessary to affect clear equity, or to

prevent irreparable injustice, the set-off will be allowed *though the debts are not mutual.*"

And the court points out that insolvency of the party against whom the set-off is claimed gives rise to the equitable jurisdiction stated.

In the case of *Hughes* v. *Trahern, Administratrix,* 64 Ill. 48, the court says on page 52:

> "The text writers on the authority of the adjudged cases concur in stating the general rule to be, in equity as well as at law, that joint and separate debts cannot be set off against each other—that is, the courts will not allow a set-off of debts accruing in different rights. It is well settled, however, that there are exceptional cases to this general rule. From an early period in the history of our law, it seems to have been conceded that special circumstances may occur creating an equity which would justify the interference of a court of equity when a court of law could afford no relief in matters of set-off. (Citing cases.)
>
> At law, there can be no set-off except as to mutual debts between parties to the record, *but the doctrine is that a court of equity in cases of insolvency will regard the real parties in interest and allow a set-off of demands in reality mutual although prosecuted in the name of others nominally interested.*"

And so in *C. D. & V. R. R. Co.* v. *Field*, 86 Ill., page 270, the court said, on page 272:

> "There is a natural equity that cross-demands should be off-set against each other; and that the balance only should be recovered; and the court of chancery recognizes this principle and acts upon it in cases where the law cannot give a remedy and a separate suit in consequence of the insolvency of one of the parties.
>
> *Appellant has a legal advantage here in having a judgment, which it can collect without allowance of set-off, and which it is proceeding unfairly and unconscientiously to enforce the collection of against the judgment debtors, whilst owing them a larger debt due, upon which it refuses to have the judgment ap-*

plied, and which is uncollectible by suit, on account of appellant's insolvency. Equity will interfere and restrain the use of such an advantage. (Citing authorities.) *The occurring insolvency of the railroad company subsequent to the judgment affords ground for the exercise of the equitable jurisdiction here invoked.*"

To the same effect is *Hahn* v. *Gates*, 102 Ill. App. 385, where the court says on page 387:

> "When the law cannot give an adequate or complete remedy a court of chancery will act and give relief. This principle has been applied in equity where a person against whom a set-off is claimed is insolvent."

The same doctrine is stated and enforced in the case of *Quick* v. *Lemon*, 105 Ill., page 578, where the court says on page 586:

> "But it is a natural equity that cross-demands should be set-off against each other and that the balance only should be recovered, and where the law cannot give a remedy in a separate action courts of chancery may grant relief.
>
> The insolvency of the party against whom equitable set-off is claimed has been held sufficient grounds for the exercise of equitable jurisdiction."

To the same effect is *Engs* v. *Matson*, 11 Ill. App. 639; *Ehrat* v. *Marrone*, 191 Ill. App. 121.

In the well considered case of *Lindsay* v. *Jackson*, 2 Paige's Ch. (N. Y.) 580, the court laid down the same doctrine stated above, and said:

> "The complainant ought not to be left to pursue his legal remedy against his defendants when from their insolvency no satisfaction of his demand could be thus obtained."

In *Porter* v. *Roseman*, 74 N. E. (Ind.) 1105, it was said:

> "It is insisted by appellee's counsel that, conceding the validity of appellant's demand against appellee, there can be no set-off, because there is no such

mutuality as is required by Section 351 of the statutes. As applied to statutory actions, the force of the contention would be admitted, but since appellant rests his answer not upon the statutes, but wholly upon the broad principles of equity, his right must be determined within the limits of that jurisdiction. It is recognized by the courts of this, and perhaps all other American states, that a court of equity will take cognizance of cross-claims between litigants, though *wholly disconnected and wanting in mutuality* and set-off one against the other whenever it becomes necessary to effect a clear equity or prevent irremediable injustice. (Citing cases.)

Barbour, in his Law of Set-Off, page 190, says:

'If a court finds a case of natural equity, not within the statute, it will permit an equitable set-off, if, from the nature of the claim, or from the situation of the parties, it is impossible to obtain justice by a cross-section.'"

After pointing out that insolvency and non-residence give rise to this special equity, the court said:

"*In enforcing an equitable set-off the court proceeds upon the principle that one demand is, pro tanto a satisfaction of the other, and that the real indebtedness is merely the balance.*

It is said in *Forbes* v. *Cooper, supra*:

'*It is certainly unconscientious for an insolvent party to coerce the payment of his claim when he is owing the other party an equal or larger sum* and thus leave the latter remediless.'"

So, in *Smith* v. *Perry*, 98 S. W. (Mo.) 337, where mutuality was lacking, the same doctrine was laid down in a case of insolvency where the court held that where the estate of the *cestui que trust* was insolvent, the trustee's estate, in an action for an accounting, brought by the administrator of the estate of the insolvent, *cestui que trust* against the trustee, was entitled to set-off in equity certain claims held by the trustees *individually* against the *cestui que trust*.

In this case it was also squarely held that the mere fact

that thereby the trustee would be paid in full, while the other creditors of the *cestui que trust* would only be paid in part, which is the principal contention of counsel for appellant in the case at bar, did not prevent the operation of the rule, saying:

> "Plaintiff urges that injustice would be done to other creditors of Lewis' insolvent estate by allowing the Perry estate to establish its counter-claims and thus virtually collect the claim in full, whereas, other creditors would only receive a dividend, but the better reasoning seems to be that no injustice is done other creditors by allowing the adjustment of all accounts as they stood at the death, assignment, or *bankruptcy of the insolvent.*"

To the same effect is *St. Paul & Minnesota Trust Company* v. *Leck*, 57 Minn. 87; 58 N. W. 826.

So, *Dubrueil* v. *Gaither*, 56 Atl. (Md.) 965, where the same doctrine was laid down. A partnership had its note discounted by a bank, the proceeds being deposited therein in the name of one of the partners as trustee, for convenience only, the deposit being owned by the partnership. After the bank and the firm became insolvent, the trustee for the partners obtained judgment against the receiver of the bank for the balance of the deposits. It was held in a suit by the receiver against all the partners, that the trustee of the partners was entitled to an equitable set-off of the balance due the bank on the note against the judgment.

The court said:

> "Whatever may have been the legal rights of the appellant in respect to the balance of this deposit, as between him and the bank, so long as the latter was a going concern, it is apparent that the makers of the discounted note were the substantial owners of the deposit, and that the two debts were essentially mutual in their nature; and, therefore in the present suit when all of the parties to the two transactions or their representatives are before the court, and no

third party is in the way, reason and justice require that for the purposes of the liquidation of the bank's affairs the doctrine of equitable set-off should be applied to the situation, and the appellee's claim should be allowed."

In principle this is exactly the situation in the case at bar.

We ask the court particularly to examine the case of *Dale* v. *Cooke*, 4 Johnson's Ch. 11, where it was held that, although generally a debt arising on a contract made with an executor cannot be set off against a debt due from the testator even in equity, yet, if it had been shown that the moneys received or collected from the debt due the executor would have gone into the estate of the testator and become a part of its assets, it could have been set off against a debt from the testator and to be paid out of his estates, because in that event clearly the estate of the testator would have been the real party in interest.

The chancellor said:

> "Here was an application to set-off a debt arising on a contract with an executor against a debt arising on a contract with the testator. They are not debts due to and from the same persons in the same capacity, and there is no mutuality. It would be confounding the contracts of testators with the contracts of executors.
>
> To remove this objection it ought at least to have appeared that the lands so leased belonged to the testator at the time of his death, and that the executors had authority to lease the same, and that the rent was made assets for the payment of debts. The will ought to have been set forth or so much of it as was requisite to satisfy the court in those particulars; the ownership of the lands leased, ought also to have been stated."

While, in the case at bar, the deposit in the bank was made by the trustees of the bankrupt and therefore as

a matter of technical law the contract was between the trustees and the bank, yet it is clear that the funds deposited belonged to the bankrupt estate, and that anything paid by the receiver of the bank on account of the deposits or any set-off that may be allowed on account of the deposit against the claim of the bank against the bankrupt estate will go into and inure to the benefit of the bankrupt estate. We have, therefore, in the case at bar the exact situation suggested by the chancellor in the case cited.

We again invite the court's attention to the case of *People v. California Safe Deposit & Trust Company*, 141 Pac. (Cal.) 1181, which we consider not only directly in point but as answering every contention that may be made against the allowance of a set-off in this case.

In that case, one Bell, was indebted to the California Safe Deposit & Trust Company in the sum of forty thousand dollars. Bell died, and in May, 1893, the claim of the trust company was filed and allowed, and payments were made thereafter by the personal representatives of the decedent so that in 1907 there was a balance due of ten thousand and ninety-three dollars and forty cents principal, together with interest from 1898. The estate of the decedent had not been wound up but was still in process of administration. Thereafter in 1902, upon application to the court by the administratrix of Bell an order was entered reducing the bond and designating the California Safe Deposit & Trust Company as depository of the funds of Bell's estate. Pursuant to this order the administratrix deposited the funds of the estate with the Trust Company from time to time, and in 1907 there was a balance due the estate of \$20,200. Subsequently the California Safe Deposit & Trust Company became insolvent, and in proceedings properly initiated, a receiver was duly appointed in 1908. In 1909 under order of

court all of the claims of the decedent's estate except the claim of the trust company, were paid, and in 1911 the receiver of the insolvent trust company presented a petition in the matter of the decedent estate asking that the administratrix pay his claim in full. The administratrix answered the petition of the receiver and claimed the right to set off the amount of her deposits as administratrix against the claim allowed to the receiver in the matter of the decedent's estate, but the Probate Court refused to take jurisdiction of that matter.

The administratrix of Bell's estate now presents this intervening petition in the insolvency of the trust company and asks that the receiver be restrained from enforcing his claim in full and also prays that she be allowed to set off against the claim of the receiver the amount of the deposits of the decedent's estate with the trust company at the time of the insolvency of the trust company. A preliminary restraining order was granted, and thereafter a demurrer to the intervening petition was sustained, and the petition dismissed, from which ruling the administratrix appealed.

The Supreme Court of California reversed the ruling of the lower court, and in a very carefully reasoned and elaborate opinion holds that notwithstanding the lack of mutuality of the claims of the administratrix and the receiver of the insolvent trust company the administratrix is entitled as a matter of equity, to off-set the amount of her deposits as such administratrix on the date of the insolvency of the trust company against the claim of the trust company against the decedent.

In view of the very pertinent language of the court in answering every material objection we shall ask the court's indulgence to quote somewhat at length from the opinion of the court in this case.

On page 1183 the court says:

"Before approaching a discussion of the ma question on this appeal, another point urged by spondent may be preliminarily disposed of. This that in no event could the claim of the administrat be allowed as a set-off against the trust compa or bank after the latter had become insolvent; th on the insolvency of the bank its claim against estate was an asset to be collected by the recei and applied ratably to the payment of claims of cr itors of the insolvent bank, including a pro rata pa ment only of the claim of the administratrix as a positor; *that to allow the claim of the administrat as such depositor to be set off against the claim the insolvent bank would be to defeat this right pro rata distribution;* that it would be an appropr tion of this latter asset of the insolvent bank to payment in full of the claim of the administrat as a depositor and *give her claim a preference which it was not entitled over that of other positors.*

But the authorities do not sustain this contenti It is generally held that a *receiver* occupies no b ter position than that which was occupied by party for whom he acts. He takes the property a rights of the one for whom he was appointed p cisely in the same condition and subject to the sa equities as existed before his apointment, and a defense, good against the original party, is go against the receiver."

The court then quotes from Pomeroy's Equita Remedies, Volume 1, Sections 186 and 187, and th proceeds:

"*This rule applies in the case of insolvent ban so that the right of set-off is to be determined by t condition of things as they existed at the moment t bank became insolvent.* (Citing *Scott* v. *Armstro* 146 U. S. 499; 13th Sup. Ct., Rep. 148 and ma other cases.)

Within these principles the right of set-off in *t matter at bar is to be determined as of the time wh the bank was adjudged insolvent, and, if that rig was available to the respective claimants at that tim the insolvency of the bank did not defeat it.*"

The court then proceeds to the main question whether the administratrix of the estate of Bell could set-off her claim for money deposited with the trust company by her as administratrix against the allowed claim of the insolvent trust company based upon the liability of the decedent Bell, and states numerous objections raised by counsel for the receiver of the insolvent trust company to the allowance of the claim of set-off, the particular objections being the want of mutuality of the claims and the fact that under the California code such a set-off ought not to be allowed.

The court then proceeds on page 1184:

> "There can be no question but that the general rule as to the necessity of mutuality is as asserted by respondent, and it may be conceded that in a strict sense there is no mutuality between the claims here under consideration; they are not due to and from the same parties and in the same capacity. The general rule, too, is well settled, as claimed, that, in actions by executors or administrators upon a cause of action arising to them after the death of the testator or intestate, a defendant cannot set-off a demand against the decedent existing at the time of his death. But this general rule is subject to exceptions which are applied in suits brought by executors or administrators such as above referred to, as well as in other actions.
>
> It will be found, when cases of the character cited are examined, that where in such actions by executors or administrators, the right of set-off has been denied to the defendants, such denial is not so much based on a want of mutuality (and that ground in many of them is not assigned as the reason), but is put upon the ground that the allowance of such a set-off might disturb the just and equal distribution of the assets of the estate among its creditors in any case where it was uncertain, from the unsettled condition of the estate, whether the assets were sufficient to pay all the debts of the decedent, or, in the case of an estate which was actually insolvent, the allowance of such set-off would not only prevent a pro rata dis-

tribution among its creditors, but, on the contrary, would give the creditors claiming the benefit of a set-off an undue preference over other creditors of the estate to the extent of full payment of his claim.

When, however, by reason of the special character of an asserted set-off, it appears that in no particular can the rights of any party interested in the assets of the estate be affected by its allowance, or when the estate is solvent and able to pay all claims against it, including the allowed claim of a defendant asserting it as a set-off, the courts in the first instance do not, and in the latter should not, apply the strict rule of mutuality to prevent the allowance of set-off."

The solvency of the O'Gara Coal Company brings the case at bar within the reasoning of the court.

The court then proceeds to cite certain instances and authorities illustrative of these propositions, and then proceeds:

"We refer to these cases as showing that the rule of mutuality is not always controlling in actions by or against personal representatives of an estate which involves its assets, but that it will be departed from in cases where it appears that permitting the set-off to be interposed cannot in any respect embarrass the administration of the estate or prejudice the rights or interests of any other party interested in its assets.

We can perceive no reason why the principles of the decisions cited should not be applied to the demands here. We think it should, and that, *notwithstanding the respective demands are not mutual*, still, if any proceeding in the estate had been taken by the bank to collect its allowed claim prior to its insolvency, or the administrator had theretofore sued to collect the estate funds on deposit with it, the estate being solvent, the demand of one party would have been available as a set-off as against the claim of the other; that the rights of the parties in that respect were reciprocal, and, as we have said, *the insolvency of the bank did not affect the right of either to have this subsequently done.*"

The court then proceeds to illustrate the justice of this rule, and says:

"The creditor may be insolvent, and it is well settled that the insolvency of a party against whom a set-off is claimed constitutes a sufficient ground for the allowance of a set-off, not otherwise available. It may be that the demand due the administrator from the creditor constitutes the principal asset of the estate out of which to pay his claim, which, of course, would require a denial of the creditor's application until the administrator could collect the assets. The only effect of denying the right of set-off to the administrator in this situation would be to compel him to sue and enforce payment from the creditor if he was solvent, and this for the sole purpose of thereupon paying it back to him in satisfaction of his claim. This would be an idle and senseless thing to require a court to do. These are special circumstances but exist here; the bank is insolvent, and the debt owed by it to the administratrix represents all the money assets of the estate. Aside from this, however, in this matter at bar the circumstances present a situation where the rule of strict mutuality should, in consonance with obvious justice, be departed from and the set-off allowed. Here there is a solvent estate and a sole creditor of it, who is also in substantial effect its debtor. The bank is entitled to have its claim against the estate paid, but the administratrix is also entitled to have it pay its debt to her which represents assets of the estate. No injury can be worked to the creditor of the bank by permitting it, and *it is entitled to no advantage over the estate through denying it. While the respective demands may not be strictly mutual, they are very intimately connected; the claimant in effect owes the estate and the estate owes him. Both demands have relation to funds of the estate. This presents a situation where, in the interest of clear right and justice an exception to the general rule of mutuality should be applied and the set-off allowed.*"

After further elaborating the court says, on page 1186:

"To deny the right of set-off under these circumstances simply for want of mutuality would be not

only unjust and oppressive towards the creditor but also an idle and absurd act."

We submit that this case involves every element that is involved in our situation. The LaSalle Street Trust & Savings Bank was designated the depository by the Federal court for the funds of the O'Gara Coal Company, Bankrupt, just as the California Safe Deposit & Trust Company was designated the depository of the funds of the estate of Bell. The La Salle Street Trust & Savings Bank had a claim against the O'Gara Coal Company arising before the bankruptcy, which is the claim now involved, just as the California Safe Deposit & Trust Company had a claim against Bell in his lifetime which was actually allowed in the Probate Court, and payments were made from time to time on this claim. The trustees of the O'Gara Coal Company after their appointment deposited funds with the La Salle Street Trust & Savings Bank prior to its insolvency, the amount of which deposits on the date of the insolvency of the La Salle Street Trust & Savings Bank constituted the claim of set-off which we now insist the trustees are entitled to, just as in the case referred to the administratrix of Bell's estate deposited funds belonging to the estate with the California Safe Deposit & Trust Company, the amount of which deposits on the date of the insolvency of that trust company constituted the claim of set-off which the court allowed in favor of the aministratrix. The O'Gara Coal Company, the bankrupt, has paid in full all of its claims other than the contested ones, and it is concededly solvent to pay any other claims in full, just as in the case cited the estate of Bell was amply solvent and paid all of its claims except the claim of the California Safe Deposit & Trust Company which was being contested. And so we claim in every particular and in all of the important details, the two cases are exceptionally alike.

In the light of the very well reasoned opinion delivered by the court in this case, we feel that this court ought to adopt the same rule and allow the set-off of thetrustees of the O'Gara Coal Company as an equitable set-off and unless this set-off be allowed, a serious injustice will be done.

As further illustrative of the same proposition, that courts will permit equitable set-offs, although the claim constituting the set-off may have arisen subsequent to the original claim of the creditor is the case of *McLane* v. *Johnson*, 9 Atl. (Vt.) 837.

In that case the complainant as administrator of a decedent's estate filed a bill against the defendant praying for the allowance of an equitable set-off. The facts appear to be these. The complainant's decedent was indebted on various notes to different parties, some of which notes were guaranteed for the decedent by the defendant. When these notes fell due demands for payment of some of the notes were made against the defendant. The defendant not having funds with which to pay, went to the complainant as administrator and asked that money of the estate be advanced to the defendant to enable him to pay these notes. The complainant as administrator pursuant to arrangement did advance money to the defendant with which to buy up the notes against the decedent's estate. The dividends to be paid thereon on the settlement of the estate to be offset against the loans made by the administrator. Thereafter, it seems that the defendant refused to permit the administrator to set-off the dividends against the amount advanced by him, and so the complainant filed this bill alleging that since the arrangement was entered into the defendant had become insolvent. The court held that a court of chancery has power to direct such a suit set-off although the right to the set-off accrued to the administrator and was never in the decedent. So, at page 839, the court said:

"The subject matter of set-off is one of the original and well established heads of equity jurisdiction. Our statutes allowing it have not taken away the jurisdiction of chancery, but have merely provided a remedy at law for the off-set of mutual claims between parties, which might always have been done in equity. At law, however, set-off can not be effected unless the demands are, in legal significance, mutual. Here the orator sues in his representative capacity, as administrator, *upon a demand arising since the death of his intestate*, and asks to have an off-set made of claims allowed against the estate he represents in favor of third persons, but now held by the defendant as assignee or equitable owner thereof. At law the claims held by the defendant could be enforced only in the names of the original holders. They were not allowances made to the defendant. They were never at law debts owing by the intestate to the defendant. Even if the debts had originally been payable to the defendant, they could not at law be off-set to a demand accruing to the orator in his representative capacity after the death of his intestate, for this would alter the course of the distribution of the assets, and give one creditor an advantage over the others.

But in equity the form of the indebtedness is disregarded, and an off-set may be decreed of liquidated demands held by an assignee or equitable owner, especially if he is insolvent. The defendant, in respect to the claims in question, stands in this relation; and his claims have been liquidated by the allowance of the commissioners and the judgment of the Probate Court thereon. He is compellable, therefore, to make the off-set, if the orator's case is in other respects made out."

So, in *Eigenman, et al.* v. *Clark, et al.*, 51 N. E. (Ind.) 725, in a suit by the assignee of a payee of a note against the maker, the court held that the maker of those notes is entitled to set-off payments made by him on a note which he had executed as surety for such payee, made after the suit was commenced, where the payee, assigned the notes executed by the maker after maturity, and was then insolvent.

The court says, on page 726:

> "Counsel for appellees insist, however, that independently of the statute appellees are entitled to an equitable set-off. Courts have long recognized set-off as a natural equity. Before the statute of set-off courts of chancery acted upon the doctrine of set-off, as grounded upon the principles of natural equity."

The court then quotes from numerous cases in support of this proposition that whenever it becomes necessary to complete equity or to prevent irremediable injustice as in case of insolvency, a court will allow an equitable set-off. And then the court says on page 728:

> "We think it fairly deducible from these decisions that insolvency is a distinct equitable ground of set-off outside of the statute."

Similarly in *Bibb Land-Lumber Company* v. *Lima Machine Works*, 30 S. E. (Ga.) 676, the court said:

> "Upon the assumption that this plea (referring to the plea of set-off) set forth a demand by the defendant against the plaintiff, it was, in substance, good. *The general rule that, in order to authorize a defendant to plead a set-off, his demand against the plaintiff must have been in existence before the bringing of the latter's suit, is not applicable, when there is a valid equitable ground for allowing the defendant to plead as a set-off a demand against the plaintiff originating after the commencement of the action. Both insolvency and non-residence have been recognized by this court as constituting good grounds for equitable set-off.* (Citing authorities.)"

In the case of *In re Crystal Spring Bottling Co.*, 100 Fed. 265, the court held that under Section 68a, a trustee in bankruptcy could avail himself of a set-off that accrued to him as trustee and not to the bankrupt, saying:

> "The trustee has moved to have the papers expunged because of these liabilities of the claimants to trustee, as an equitable set-off, and the motion has now been heard. The set-offs provided for in

the Bankrupt Acts are in cases of mutual debts or mutual credits between the estate of a bankrupt and of a creditor's Section 68a. *This would seem to include a liability that has accrued to a trustee which had not accrued to the bankrupt when the claim and liability are mutual. The mutuality required is the same as that of the Act of* 1867."

In *Doane* v. *Walker*, 101 Ill. 628, and *Walker* v. *Doane*, 108 Ill. 236, the Supreme Court of Illinois held that where the rental value of premises purchased at an administrator's sale for the time during which they were wrongfully withheld from the purchaser by the widow was more than the amount due the widow on her claim for yearly dower payment, when she was insolvent, the purchaser was entitled to relief by equitable set-off.

In *Jeffries* v. *Evans*, 43 Am. Dec. 158 (6 B Monroe (Ky.) 119, the complainant filed a bill to restrain the enforcement of a judgment against him obtained by one Evans, and prayed that he be allowed to off-set that judgment against two judgments that the plaintiff obtained against Evans. The bill alleges that Evans had assigned his judgment to the other defendants, and Evans was insolvent. The lower court dismissed the bill but the upper court reversed this decision and held that the plaintiff was entitled to relief, saying, page 159:

> "The relief sought by the complainant does not depend upon our statute authorizing set-offs. That statute is applicable only to suits at law. The right to an off-set in chancery exists independent of the statute, and is controlled only by the general principles of equity. In this case the complainant was responsible for the judgment in favor of Evans, and to be relieved against such responsibility he had a right, as Evans was insolvent, to set up his claims upon him in a court of equity. It is true the judgment was against him and others; but that fact did not affect his liability, and from anything that appears in this record, he was equally entitled to relief as if the judgment had been against him alone."

Thus, it is well settled that an executor may apply a legacy to the payment of a debt due from the legatee to the estate, and this on the ground that the legatee is not entitled to receive his legacy and at the same time withhold from the estate moneys owing by him to the estate. As Waterman on Set-Off said, Par. 210, quoting from *Smith* v. *Kearney*, 2 Barb. Ch. 549:

> "The right of an executor or administrator to retain in such cases, depends upon the principle that the legatee or distributee is not entitled to his legacy or distributive share while he retains in his own hands a part of the fund out of which that and other legacies or distributive shares ought to be paid or which were necessary to extinguish other claims on that fund. In other words, the legatee or distributee in such cases seeks to obtain a part of the fund which the distribution or letters of administration have placed in the hands of the executor or administrator to pay debts or legacies or distributive shares, while such legatee or distributee is himself debtor to the estate, and by withholding payment diminishing the fund to that extent, and it is against conscience that he should receive anything out of the fund without deducting therefrom the amount of that fund which is already in his hands as a debtor of the estate."

Thus, again in the case of *Jeff* v. *Wood*, 2 P. Wms. Rep. 128, it was decided that the executor was entitled to retain a legacy as against the assignee in bankruptcy or the legatee in satisfaction of a debt due from the legatee to the estate of the testator.

In principle the same is true of the case at bar. The bank received moneys belonging to the estate, and withholds the same from the estate. It would be unconscionable to permit it to be paid its debt in full out of the funds of the estate, and yet permit it to withhold from the estate funds received by it from and belonging to the estate and compel the estate to go into another court, there to receive only a portion of the fund received and withheld by the bank.

In conclusion, we submit that for the reasons hereinbefore stated, the order of the Circuit Court of Appeals for the Seventh Circuit should be reversed and the order of the District Court should be affirmed.

Respectfully submitted,

Harry M. Wolf,

Alexander F. Reichmann,

Arthur M. Cox

Counsel for Petitioner.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1921.

No. ~~846~~ 317

FRANK G. GARDNER, as Trustee in Bankruptcy of the O'GARA COAL COMPANY,
Petitioner,

vs.

CHICAGO TITLE AND TRUST COMPANY, as Receiver of the LaSalle Street Trust and Savings Bank,
Respondent.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Brief and Argument for Respondent.

HIRAM T. GILBERT,
Counsel for Respondent.

BARNARD & MILLER PRINT, CHICAGO.

SUBJECT INDEX.

ALPHABETICAL LIST OF CASES.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1921.

No. 846.

FRANK G. GARDNER, as Trustee in Bankruptcy of the O'GARA COAL COMPANY,
Petitioner,

vs.

CHICAGO TITLE AND TRUST COMPANY, as Receiver of the LaSalle Street Trust and Savings Bank,
Respondent.

Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF AND ARGUMENT FOR RESPONDENT.

STATEMENT OF THE CASE.

Petitioner's "Statement of the Case" is, it seems to us, somewhat too elaborate. The facts, so far as they are material, may be briefly stated as follows:

1. On September 8, 1913, the La Salle Street Trust and Savings Bank for value acquired from C. B. Munday a demand promissory note for $15,000 made by the O'Gara Coal Company dated September 6, 1913, payable to the order of C. B. Munday and by the latter endorsed, bearing interest at six per cent per annum after date and secured by collateral furnished by the O'Gara Coal Com-

pany consisting of 1,500 shares of the par value of $100 each of the capital stock of the Harrisburg-Saline Collieries Company. (Rec., 22, 23.) This collateral has ever since remained in the possession of the bank, or its receiver, no steps ever having been taken to convert it into money.

2. On October 3, 1913, the District Court, upon petition filed September 13, 1913, adjudged the O'Gara Coal Company a bankrupt and on November 11, 1913, appointed Thomas J. O'Gara, Fred A. Busse and Edward Weltman trustees, who duly qualified. Busse, one of these trustees, having died, the District Court on June 28, 1914, appointed as his sucessor William C. Niblack, who, on June 30, 1916, became sole trustee and continued to be sole trustee until his death on June 6, 1920. (Rec., 22.)

3. On various dates between November 11, 1913, and June 11, 1914, the then trustees of the bankrupt (Niblack not being one of them) deposited in the bank various sums so that when the bank suspended there stood to their credit in their deposit account on the books of the bank $19,843.62. (Rec., 23, 24.)

4. On June 12, 1914, the LaSalle Street Trust and Savings Bank, having become insolvent, suspended business and on June 18, 1914, the Circuit Court of Cook County appointed said William C. Niblack as receiver therefor and on January 18, 1915, by decree, duly dissolved it and since the appointment of the receiver it has been in process of being wound up. Niblack continued to act as such receiver until his death on June 6, 1920. (Rec., 23.)

5. On June 5, 1916, the then trustees of the bankrupt, O'Gara, Weltman and Niblack , filed in the Circuit Court of Cook County their petition for the allowonce of a preferred claim for $19,843.62 against the estate of the in-

solvent bank, but subsequently abandoned their contention for the allowance of a preferred claim and the court allowed a general claim in their favor for $19,843.62. (Rec., 24, 25.)

6. Upon this claim one dividend for $4,963.35 was paid August 14, 1916, and another dividend for $1,985.34 was paid June 18, 1918, by the receiver of the bank of the bankrupt estate. (Rec., 24.)

7. On September 11, 1914, Niblack, as receiver of the bank, filed a proof of unsecured claim against the bankrupt estate for the amount of the $15,000 note and subsequently, on August 21, 1917, filed an amended proof of secured claim for that amount but never received any dividends and no action was ever taken thereon. (Rec., 25, 26.)

Upon the foregoing facts the referee in bankruptcy, upon petition of the trustee in bankruptcy, held that they were entitled to have the $19,843.62, less the two dividends of $4,963.35 and $1,985.35, the difference being $12,894.93, set off against the amount of the $15,000 note and that upon paying the receiver this difference they were entitled to have surrendered to them the $15,000 note and the collateral. The District Court concurred in this view, but the Circuit Court of Appeals held the contrary and directed the dismissal of the petition.

BRIEF.

I.

THE RELATION OF A DEPOSITARY TO THE TRUSTEES OF A BANKRUPT ESTATE IS NOT A FIDUCIARY RELATION BUT IS SIMPLY THAT OF DEBTOR AND CREDITOR.

This point is *res adjudicata* by the decision of the Circuit Court of Cook County allowing the claim of the trustees in bankruptcy as a general claim.

There is no statute expressly making deposits of trustees in bankruptcy preferred claims, nor is there any rule of construction or other authority for holding that because depositaries are provided for by law the deposits they receive as such are to be regarded as preferred claims.

II.

AS A SECURED CREDITOR THE RECEIVER OF THE BANK OCCUPIED A POSITION ESSENTIALLY DIFFERENT FROM THAT OF AN UNSECURED CREDITOR.

The $15,000 note was secured by collateral. The claim filed by the receiver of the bank against the bankrupt estate was a secured claim. This presents an essentially different situation from that which would be presented if the claim of the bank was unsecured.

At the time of the adjudication in bankruptcy, the bank had the right to apply the collateral upon the note and present its claim against the bankrupt estate for the balance. This right could not be changed by subsequent events. The case is no different from what it would have been had the bankrupt at the time of the bankruptcy, had on deposit in the bank an amount of money equal to the value of the collateral.

III.

AT NO TIME AFTER THE INSOLVENCY AND SUSPENSION OF THE TRUST & SAVINGS BANK WAS THERE ANY RIGHT OF SET-OFF EITHER IN THE TRUST & SAVINGS BANK OR IN THE TRUSTEES OF THE BANKRUPT.

No right of set-off existed in favor of the trustees in bankruptcy as against the receiver of the Trust & Savings Bank. The right of set-off is reciprocal.

34 Cyc. 723.

In Re: United Grocery Company, 253 Fed. 267.

The authorities cited by petitioner are not in point.

The rights of the parties were absolutely fixed at the time of the suspension of the bank and they could not be subsequently changed. If there was a right of set-off at that time it was a mutual right and not a right which only one party could then avail itself of.

IV.

THE CONTROVERSY HERE IS NOT ONE BETWEEN THE O'GARA COAL COMPANY AND THE BANK, BUT IS ONE BETWEEN THE CREDITORS OF THE BANKRUPT COMPANY AND THE CREDITORS OF THE INSOLVENT BANK.

The O'Gara Coal Company and the LaSalle Street Trust & Savings Bank have ceased to exist. The sins of the Coal Company cannot be visited upon its creditors nor the sins of the Trust & Savings Bank upon its creditors. The contest here is not one between the Coal Company and the bank but is one between the two sets of creditors.

The rights of the Coal Company's creditors were fixed on the date of the filing of the petition in bankruptcy and those of the Trust & Savings Bank were fixed on the date of its suspension.

The creditors of both concerns are equally innocent victims and there would seem to be no justification for favoring one set of these creditors at the expense of the other.

V.

THE MAXIMS "HE WHO SEEKS EQUITY SHOULD DO EQUITY" AND "HE WHO COMES INTO EQUITY SHOULD HAVE CLEAN HANDS" HAVE NO APPLICATION TO THIS CASE.

William C. Niblack occupied a dual position, being not only the receiver of the bank but being also a trustee of the bankrupt estate. The bankrupt estate would not in any event be in a position to claim any advantage from an act of Niblack, receiver, which it would not have if he had not performed that act. The case, therefore, must be viewed precisely as if the receiver of the bank had not filed any claim against the bankrupt estate.

Furthermore, the claim filed by Niblack, as receiver, as amended, was not an unsecured claim but was a claim for any excess of the amount of the note over and above the value of the collateral. Payment of the excess, if any, of the amount of the note over and above the value of the collateral is the only equity which Niblack, as receiver of the bank, was seeking to enforce and was the only equity of which the court could, in any event, take cognizance.

The cases of *In re Hooper*, 175 Fed. 412, 424, and *In re Siegel-Hillman Dry Goods Co.*, 111 Fed. 986, are not in point.

VI.

THE TRUSTEES IN BANKRUPTCY ARE ESTOPPED FROM CLAIMING ANY RIGHT OF SET OFF.

The trustees in bankruptcy having obtained an order of the state court for the payment of the $19,843.62 out of the assets of the Trust & Savings Bank in due course of administration *pro rata* with the Trust & Savings Bank's other creditors and having received dividends thereon are estopped from now claiming the right to retrace their steps and pay back part of the money which they received and have their right of set-off enforced.

In re Berry, 174 Fed. 409, 98 C. C. A. 360.

Standard Varnish Co. v. *Haydock*, 143 Fed. 318, 74 C. C. A. 456.

20 Corpus Juris 32.

VII.

THIS MATTER HAS BECOME RES ADJUDICATA.

The jurisdiction of the state court was complete. The relief granted by it was entirely inconsistent with the relief now claimed by the trustee in bankruptcy and to grant the relief the trustee now claims would operate as a review of the decree of the state court by the courts of the United States. This cannot be permitted.

ARGUMENT.

I.

THE RELATION OF A DEPOSITARY TO THE TRUSTEES OF A BANKRUPT ESTATE IS NOT A FIDUCIARY RELATION BUT IS SIMPLY THAT OF DEBTOR AND CREDITOR.

This point was submitted to and decided by the Circuit Court of Cook County when it passed upon the petition of the trustees in bankruptcy for the allowance of a preferred claim against the insolvent bank. (Rec., 6-7.) It allowed the claim as a general claim. The trustees accepted this general claim and received dividends on it. (Rec., 6.) The question, therefore, is *res adjudicata*.

It is not claimed that the deposits made by the trustees in bankruptcy were special deposits, the precise money deposited to be retained and returned to the depositors when demanded. The bank was expected to mingle the deposits with its other funds and to have the right to use these funds for its banking purposes. Otherwise why should it go to the trouble and expense of furnishing a bond to secure the trustees in bankruptcy against loss? Obviously, it gave the bond in order that it might have the use of the funds for banking purposes until they were called for. Hence the relation between the trustees in bankruptcy and the bank was merely that of debtor and creditor.

To give a deposit the character of a preferred claim it must be expressly or impliedly declared such by statute, or it must be capable of identification or segregation from the bank's other funds. There is no statute expressly making deposits of trustees in bankruptcy pre-

ferred claims, nor is there any rule of construction or other authority for holding that because depositaries are provided for by law the deposits they receive as such are to be regarded as preferred claims.

There is nothing, we submit, in the 27 pages of argument by the petitioner (22-48) which requires further answer on our part.

II.

AS A SECURED CREDITOR THE RECEIVER OF THE BANK OCCUPIED A POSITION ESSENTIALLY DIFFERENT FROM THAT OF AN UNSECURED CREDITOR.

The fact must not be overlooked that the note for $15,000 which the bank held was secured by collateral and that the claim which its receiver filed against the bankrupt estate, though originally framed as an *unsecured* claim, was, as subsequently amended, a *secured* claim. Upon this claim no action had ever been taken by the bankruptcy court and all that the receiver of the bank could receive from the bankrupt estate was the amount of the dividends which might be paid upon the excess, if any, of the amount of the note over and above the value of the collateral.

Assuming, for the purposes of the argument, that if the claim of the receiver of the bank had been unsecured the right of set-off would have existed in favor of the trustees of the bankrupt (an assumption which, we submit, is unwarranted), is not an essentially different situation presented by the circumstances that the bank held collateral security for its note?

Of course, if the bank had held no collateral at the time of the adjudication of bankruptcy it could thereafter have done nothing towards securing the payment of the note other than filing its claim against the bankrupt estate and

receiving such dividends thereon as might be declared. It could not have applied in payment of the note any of the money deposited with it by the trustees in bankruptcy. But, having collateral security, it was entitled to convert that security into money and apply the proceeds in payment of the note.

If, then, at any time after the trustees had made their deposits and prior to June 12, 1914, the bank had seen fit to convert the collateral into money and apply the proceeds in satisfaction or part satisfaction of the note it would have acted strictly within its rights. If the proceeds of the collateral paid the entire note the bank would have had no claim against the bankrupt estate and the bankrupt estate would have had no claim against the bank excepting for the amount of the deposit account and for the surplus, if any, of the proceeds of the collateral over and above the amount due upon the note. If the proceeds of the collateral were insufficient to pay the note, the bank would have had a claim for the deficiency against the bankrupt estate and the bankrupt estate would have had a claim against the bank for the amount of its deposit account.

Does the fact that the bank was indulgent to the bankrupt estate and neglected to avail itself of its right to convert the collateral into cash and apply the proceeds on the note change the situation so far as concerns the respective rights of the bankrupt estate and the insolvent bank?

We submit that it does not. The receiver of the bank succeeded to all its rights and was authorized to do in respect to this matter whatever the bank could have done.

The collateral which the bank held was *means* of payment which should be treated the same as if it were *actual* payment. In effect the situation was no different from

what it would have been had the bankrupt, at the time of the bankruptcy, had on deposit a sum of money equal to the value of the collateral. The fact that the collateral was not actually applied in payment of the note could not change the respective rights of the parties. *The bank's right to apply the value of the collateral upon the note became absolute at the time of adjudication in bankruptcy and it could not be changed by subsequent events.*

If, therefore, there was any right of set-off in the bankrupt estate as against the insolvent bank, which we respectfully deny, it could in no event be extended further than the excess, if any, of the amount of the note over and above the value of the collateral.

III.

AT NO TIME AFTER THE INSOLVENCY AND SUSPENSION OF THE TRUST AND SAVINGS BANK WAS THERE ANY RIGHT OF SET-OFF EITHER IN THE TRUST AND SAVINGS BANK OR IN THE TRUSTEES OF THE BANKRUPT.

Leaving out of consideration the fact that the trustees of the bankrupt procured the allowance by the Circuit Court of Cook County of their claim against the Trust & Savings Bank and received dividends thereon it is submitted that no right of set-off existed in favor of the trustees in bankruptcy as against the receiver of the Trust & Savings Bank.

In 34 Cyc. 723, it is said:

> "Courts of equity usually follow the law in matters of set-off, in the absence of any intervening equity, and thus where there are cross demands between two parties of such a nature that if both are recoverable at law they would be the subject of legal set-off, then if either of the demands is a matter of equitable jurisdiction the set-off will be enforced in equity. *But it is held as a general rule that in*

equity, as at law, the right of set-off is reciprocal and only mutual claims and such as are in the same right can be set-off."

The general rule thus stated is so well settled that it would serve no useful purpose to cite adjudged cases in its support. The right of set-off being, as a general rule, reciprocal, and it being perfectly clear that neither the Trust & Savings Bank, while it was a going concern, nor its receiver, after it became insolvent, could have successfully claimed the right to set-off the amount due upon the O'Gara Coal Company's note against the deposit made by the trustees in bankruptcy, it is necessary to inquire whether there are any circumstances in this case which would take it out of the operation of the general rule thus laid down.

In *In Re United Grocery Company*, 253 Fed. 267, the facts were as follows:

On January 4, 1917, the United Grocery Company was adjudicated a bankrupt. Subsequently trustees were duly elected by the creditors and appointed by the referee. On the date the company was adjudicated a bankrupt it was indebted to the Heard National Bank in the sum of $30,482.47. The Heard National Bank closed its doors on January 16, 1917, and in due course a receiver to wind up its affairs was appointed by the comptroller of the currency. Between the 4th and the 16th of January, 1917, the receiver of the bankrupt deposited with the Heard National Bank, to his credit as receiver, various amounts which aggregated, after the payment of certain checks against the deposit, the sum of $7,586.04. On January 19, 1917, the receiver of the Heard National Bank filed his proof of claim before the referee for $30,480.47. An order having been made for a re-examination of the proofs of the bank's claim, the referee, on

October 31, 1917, entered an order allowing the bank's claim in the sum of $30,480.47 upon the payment to the trustee by the receiver of the bank of $7,586.04 deposited by the receiver of the bankrupt in the bank prior to January 16, 1917, after his appointment on January 4, 1917. Upon a petition for a review being filed, Call, District Judge, among other things, said:

"There is no dispute as to the facts. It is unquestioned that the bankrupt, on the date of the adjudication on January 4th, was indebted to the bank in the sum of $30,480.47, nor is it questioned that the receiver of the bankrupt deposited in a general checking account with the bank, between January 4th and 16th, the $7,586.04, nor that the bank closed its doors on January 16th, and a receiver was duly appointed by the comptroller to wind up its affairs and make distribution of its assets according to the laws governing such cases. The decision of the question seems to me to depend upon whether the right to a set-off, either at law or in equity, exists under these facts. As I understand the Bankruptcy Act and the decisions of the courts, neither the bank nor its receiver could have applied this deposit to payment of the debt owed the bank by the bankrupt nor the trustees of the bankrupt apply this deposit to the discharge *pro tanto* of the debt to the bank, because there is a want of mutuality in the demands, and because, as I understand the law and the adjudicated cases, upon the bankruptcy of an individual, or the insolvency of a national bank and appointment of a receiver to wind up its affairs by the comptroller, the creditor becomes an equitable *cestui que trust* in the assets in the proportion that his claim bears to the total amount of the claims, and his right to participate in the dividends arising from such assets may not be diminished by claims arising subsequently to the bankruptcy or insolvency. This right to participate is determined as of the date of bankruptcy or insolvency. The bank's right to participate in the dividends from the bankrupt's estate matured certainly on January 4th, when the adjudication was made, and the right of the trustees to

participate in the dividends of the assets of the bank matured on January 16th, when the comptroller took charge of the affairs of the bank, and this right could not be taken from the bank's receiver by the subsequent deposit of moneys in the bank to a general account, to which no trust was affixed, and which created simply the relation of debtor and creditor between itself and the depositor.

The fact that the bankrupt may pay in full its creditors, and the bank may not be able to do so, can not change the principles of law. It may work an apparent hardship in the particular case, but all general rules sometimes do that. I am of opinion, therefore, that the order of the referee should have reallowed the claim of the receiver of the bank in the full amount allowed conditionally.

The petition to review will therefore be granted, and the order of the referee modified accordingly."

It is insisted in behalf of the trustees in bankruptcy, that the foregoing decision was erroneous and to support this contention a number of authorities are cited, and, among them, *People* v. *California Safe Deposit and Trust Company*, 168 Cal. 241, 141 Pac. 1181; *In re Harper*, 175 Fed. 412; *In re Siegel-Hillman Dry Goods Company*, 111 Fed. 980, 986; *Scott* v. *Armstrong*, 146 U. S. 499, and *In re Chrystal Spring Bottling Company*, 100 Fed. 265.

In *People* v. *California Safe Deposit & Trust Company*, 168 Calif. 241, 141 Pac. 1181, which is relied upon by petitioner to justify the allowance of the set-off, the facts were these:

Thomas Bell died testate in October, 1892. At the time of his death he was indebted to the California Safe Deposit & Trust Company on a promissory note for $40,000. The Trust Company presented a claim against the estate on this note and it was allowed. Afterwards payments were made by the estate on the claim until on December 19, 1907, there was a balance due of $10,093.40 with interest thereon at 6 per cent per annum from April 23,

1898. On February 13, 1902, on application of the administratrix of the estate an order of court was made appointing and designating the Trust Company as the depositary of the funds of the estate and ordering and directing the administratrix to deposit with it all the moneys of the estate. The Trust Company accepted the appointment and thereafter acted as such depositary until it became insolvent and ceased to do business. The administratrix, after the making of the order, had deposited from time to time with the Trust Company funds of the estate so that she had on deposit with the Trust Company on December 19, 1907, when it became insolvent and ceased to do business a sum of money, funds of the estate, exceeding $20,200, no part of which had been paid to the administratrix. The estate of Bell was solvent so that there never was any time any question but that the claim of the Trust Company would be paid in full.

Such being the facts the question presented was whether the administratrix was entitled to set-off, in payment of the balance due from the estate to the insolvent Trust Company, sufficient for that purpose of her deposit in the Trust Company. The court held she was entitled to avail herself of the set-off. After referring to certain cases in which the right of set-off had been denied and to a few exceptional cases in which it had been allowed, the court said:

> "We can perceive no reason why the principles of the decisions cited should not be applied to the demands here. We think it should, and that, *notwithstanding the respective demands are not mutual, still, if any proceeding in the estate had been taken by the bank to collect its allowed claim prior to its insolvency, or the administrator had theretofore sued to collect the estate funds on deposit with it, the estate being solvent, the demand of one party would have been available as a set-off against the claim of the other; that the right of the parties in that re-*

spect were reciprocal, and, as we have said, the insolvency of the bank did not affect the right of either to have this subsequently done."

After some further discussion the court said:

> "Applying these views to the respective demands of the parties here, we are satisfied that the facts stated in the petition in intervention show that a right of set-off between these demands could have been asserted by either of them *if any proceeding or action had been brought by the one against the other at the time of the insolvency of the bank; that this right was reciprocal;* and that a sufficient cause for the relief asked by the administratrix was shown in her petition for intervention."

It will be seen from the facts stated in the opinion of the court that Bell's estate was and always had been solvent and that accordingly no injustice would have been done to any of its creditors or other persons interested therein if the moneys of the estate which the administratrix deposited with the Trust & Savings Bank, instead of being so deposited, had been paid to the Trust Company in payment of the indebtedness to it of Bell's estate. If, therefore, there was any absence of mutuality in the situation it was purely technical. The court in its opinion asserted

> "that a right of set-off between these demands could have been asserted by either of them (*i. e.*, either of the parties) *if any proceeding or action had been brought by the one against the other at the time of the insolvency of the bank.*"

That was not the situation in the case now before the court. The receiver of the bank, when he took possession of its assets, could not have maintained a right to have the amount due upon the note of the O'Gara Coal Company set off against the $19,843.62 which the trustees in bankruptcy had on deposit in the Trust & Savings Bank at the time it suspended. His only right at that

time was to convert into cash the collateral which he held and apply it upon the note. On the other hand the trustee of the bankrupt estate of the O'Gara Coal Company would not have been permitted by the bankrupt court to consent to any set-off of the $19,843.62 or any part of it against the note, even if the receiver of the Trust & Savings Bank had asked for it, without a showing that the allowance of such set-off would be in the interest of the creditors of the bankrupt, for this deposit might have been the only asset of the bankrupt estate available for the payment of the O'Gara Coal Company's debts and the expenses of the administration of the banking estate.

Clearly, then, there is nothing in this California case which supports the contention of the trustee in bankruptcy that there could have been a set-off allowed at any time after the suspension of the Trust and Savings Bank.

In *In Re Harper*, 175 Fed. 412, the decision of the court was merely that a trustee in bankruptcy might set up as a set-off against a claim filed by a creditor a claim of unliquidated damages existing in favor of the bankrupt against such creditor which passed to the trustee, and which, under the law of the state, the bankrupt, but for his bankruptcy, might have pleaded as a counter claim in the action by the creditor, and the trustee might have such claim liquidated by the referee, unless some other mode of liquidation were directed.

It is apparent that that case has no similarity to the one now before the court. The demands of both parties were subsisting demands at the time of the bankruptcy and the right of set-off was then an existing right.

In *In Re Siegel-Hillman Dry Goods Company*, 111 Fed. 980, 986, the facts were as follows:

A bank held notes of a corporation, endorsed before

delivery by a partnership, which thereby became liable as a joint maker. A short time before the corporation became bankrupt, and while insolvent, it made a payment on the note, which was received by the bank in the usual course of business, and without notice actual or constructive of the corporation's insolvency. After the bankruptcy the endorser paid the remainder due on the notes. Both the bank and the partnership held other large claims against the bankrupt estate.

Upon the foregoing facts the court held that if the bank was required, under the provisions of the bankruptcy act, to surrender the payment received from the corporation as a condition precedent to proving its remaining claims against the estate, the effect would be to leave the notes to that extent unpaid, and a subsisting liability not only of the estate, but also, in equity, of the partnership, as endorser, and that the court of bankruptcy, in the exercise of its power to adjust the equities between such creditors, would transfer the obligation to surrender the amount of such payment from the bank to the partnership as a condition to the proving of its remaining claims, the circumstances of the particular case being such that the rights of general creditors would not be affected thereby.

It thus appears that the claims in question were claims which were in existence at the time of the bankruptcy and that to enforce equity as between the parties would not in any manner prejudice the rights of the general creditors of the bankrupt.

In *Scott v. Armstrong*, 146 U. S. 499, the court held that a customer of the National Bank, who in good faith borrowed money of the bank, gave his note therefor due at a distant date, and deposited the amount borrowed to be drawn against, any balance to be applied to the pay-

ment of the note when due, had an equitable (but not a legal) right, in case of the insolvency and dissolution of the bank and the appointment of a receiver before the maturity of the note to have the balance to his credit at the time of the insolvency applied to the payment of his indebtedness on the note.

There, too, the claims which were the subject of the right of set-off were existing claims at the time of the insolvency of the bank.

In *In re Chrystal Springs Bottling Company*, 100 Fed. 265, the facts as stated by the district judge were as follows:

Five persons, only one of whom was solvent, had a joint claim against the estate of the bankrupt, and each of them had severally become liable to the trustees in bankruptcy, the amounts of such liabilities aggregating more than the claim, but it did not appear that the joint liability and the separate debts grew out of the same transaction, or that either formed the inducement or consideration of the other.

Such being the facts, the court held that there could be no set-off of such claims, and that the trustee's motion to expunge the proof of claim by the creditors must be denied, though without prejudice to any rights the parties might have, and for the declaration of a dividend. The district judge in delivering his opinion, said:

> "The set-offs provided for in the bankrupt act are in 'cases of mutual debts or mutual credits, between the estate of a bankrupt and the creditor.' Sec. 68a. This would seem to include a liability that has accrued to a trustee which had not accrued to the bankrupt, when the claim and liability are mutual."

Of course this was *obiter dictum*. However, conceding it to be a correct statement of the law, it would have no application to the case now before the court. While

there four of the claimants were insolvent they were not in bankruptcy and consequently there was no question as to the rights of their respective creditors. To have allowed a set-off would have worked no injustice to them. It would have been otherwise had their estates been in process of distribution in the court of bankruptcy.

The other authorities cited by petitioner merely lay down the proposition that a court of equity may, under exceptional circumstances, allow a set-off which would not be allowed in an action at law. They present no example of a set-off under circumstances similar to those presented in the case now under consideration.

The contention of petitioner seems to be that the bankrupt estate's right of set-off possessed the peculiarity that it could be reserved and held in suspense and availed of or not availed of as might at any time after the bank's insolvency appear to be to the interest of the bankrupt estate. In other words, while the receiver of the bank could not enforce any right of set-off, the bankrupt estate could keep its right of set-off in suspense indefinitely until circumstances enabled it to decide whether it was advantageous to use it or not.

No authority is cited to support any such proposition. The rights of the parties were absolutely fixed at the time of the suspension of the bank and they could not be subsequently changed. If there was a right of set-off at that time it was a mutual right, and not a right which only one party could then avail itself of.

IV.

THE CONTROVERSY HERE IS NOT ONE BETWEEN THE O'GARA COAL COMPANY AND THE BANK BUT IS ONE BETWEEN THE CREDITORS OF THE BRANKRUPT COMPANY AND THE CREDITORS OF THE SOLVENT BANK.

Petitioner insists that the receiver of the bank has no greater rights than the bank itself would have had. To support this proposition it cites *Republic Life Insurance Company* v. *Swigert*, 135 Ill. 150. That decision is not applicable to the case of a receiver of an insolvent bank. Such a receiver not only represents the bank, but also represents the creditors and can assert any claim which the creditors themselves could enforce. *Golden* v. *Cerrenka*, 278 Ill. 409.

Both the O'Gara Coal Company and the La Salle Street Trust and Savings Bank have ceased to exist, the former by the adjudication in bankruptcy and the latter by the appointment of the receiver and the decree of dissolution. The sins of the Coal Company cannot be visited upon its creditors nor the sins of the Trust and Savings Bank upon its creditors. The question here is, what are the respective rights of these two sets of creditors with respect to the funds of the two estates? The rights of the Coal Company's creditors were fixed on the date of the filing of the petition in bankruptcy and those of the Trust and Savings Bank were fixed on the date of its suspension.

It was, of course, unfortunate for the creditors of the Coal Company that the Trust and Savings Bank should fail, but it was likewise unfortunate that the Coal Company should become bankrupt, *and that, too, only five days after the Trust and Savings Bank had cashed its note for* $15,000. Perhaps if the O'Gara Coal Company

had not become bankrupt the Trust and Savings Bank might not have failed. In any event the delinquency of the Coal Company must have contributed to the suspension of the Trust and Savings Bank.

The creditors of both concerns are equally innocent victims and there would seem to be no justification for favoring one set of their creditors at the expense of the other.

V.

THE MAXIMS "HE WHO SEEKKS EQUITY SHOULD DO EQUITY AND "HE WHO COMES INTO EQUITY SHOULD HAVE CLEAN HANDS" HAVE NO APPLICATION TO THIS CASE.

The authority of the bankruptcy court to adjudicate upon the right of set-off is based—by the petitioner—upon the proposition that the receiver of the bank has voluntarily come into that court and invoked its aid. The petitioner does not claim, and, we submit, could successfully claim, that if the receiver of the bank had not voluntarily come into the bankruptcy court and invoked its aid that court could have assumed jurisdiction to allow a set-off. It is therefore proper to consider how it happened that the receiver of the bank came into bankruptcy court and the manner and purpose for which he came in. This is a proper inquiry to be made in determining the rights of the depositors of the bank whom the receiver of the bank has assumed to represent.

As is pointed out in the preceding statement of facts (*ante*, p. 2) William C. Niblack occupied a dual position, being not only the receiver of the bank but being also a trustee of the bankrupt estate. It is plain, therefore, that the bankrupt estate would not in any event be in a position to claim any advantage from an act of Niblack as receiver which it would not have if he had not

performed that act. In other words, Niblack as trustee of the bankrupt estate was not in a position to assert any right against the creditors of the Trust and Savings Bank because of an act performed by him as receiver of the bank. The case, therefore, must be viewed precisely as if the receiver of the bank had never filed any claim against the bankrupt estate.

Furthermore, while Niblack, as receiver of the bank, originally filed against the bankrupt estate a proof of unsecured claim he subsequently amended his proof so as to make it a proof of a secured claim, or, in other words, a claim for any excess of the amount of the note over and above the value of the collateral. After having so amended his proof of claim he took no action upon it and in no manner invoked the aid of the court. So far as his claim as receiver of the bank is concerned it is no different from what it would be if the collateral had been disposed of and the claimant were seeking merely payment of a deficiency in the value of the collateral over and above the amount of the note. Payment of the excess, if any, of the amount of the note over and above the value of the collateral is the only equity which Niblack, as receiver of the bank, was seeking to enforce and was the only equity of which the court could in any event take cognizance.

In support of his contention that the court of bankruptcy acquired the right to enter the decree it did enter because the receiver of the bank filed his secured claim against the bankrupt estate the petitioner cites *In re Harper*, 175 Fed. 412, 424, and *In re Siegel-Hillman Dry Goods Co.*, 111 Fed. 986. Those cases are not in point. In each of those cases the claimant was in court seeking to enforce an unsecured claim against the bankrupt estate while here the receiver of the bank, if in court at all, is merely seeking payment of the excess, if any, of the

amount of the $15,000 note over and above the value of the collateral.

Of course, if Niblack, *as receiver of the bank*, had not filed any claim in behalf of the insolvent bank in the bankruptcy proceedings, it could not be pretended that the bankrutpcy court could have brought him into the bankruptcy proceedings at the instance of Niblack, *as trustee in bankruptcy*, and adjudicated upon the rights of the insolvent bank. Would, therefore, the court in any event, hold that Niblack, *as trustee in bankruptcy*, might gain an advantage for the benefit of the creditors of the bankrupt estate over the creditors of the insolvent bank by giving the bankruptcy court jurisdiction over himself *as receiver of the bank?*

We venture to assert that law libraries may be searched in vain for a precedent authorizing one who happens to be a trustee of two distinct estates to take a voluntary step by which one estate is given, as against the other estate, a right which, but for such step, it would not possess.

It is true this point was not discussed by the Circuit Court of Appeals, but that is immaterial. The Circuit Court of Appeals has entered a judgment in favor of the receiver of the insolvent bank. The question here now is whether that judgment was right under the facts shown by the record. If it was right, it cannot be disturbed, because the court may have given a wrong reason for its conclusion. Regardless of what occurred in the Circuit Court of Appeals the respondent is entitled to urge any reason justified by the record why the judgment of that court should not be disturbed.

VI.

THE TRUSTEES IN BANKRUPTCY ARE ESTOPPED FROM CLAIMING ANY RIGHT OF SET-OFF.

Even if the trustees in bankruptcy subsequent to the insolvency of the bank were in a position to assert a right of set-off they lost that right through their subsequent conduct.

In June, 1916, nearly two years after the Trust & Savings Bank suspended, when, according to the present contention of appellee, the trustees in bankruptcy might have presented their petition in the bankruptcy proceeding and secured an order setting off so much of the deposit account of $19,843.62 against the $15,000 note of the O'Gara Coal Company as was necessary to satisfy it, they voluntarily entered their appearance in the state court and sought and obtained an order of that court for the payment in full of the $19,843.62 out of the assets of the Trust & Savings Bank in due course of administration pro rata with the Trust and Savings Bank's other creditors. They expressed no willingness to have the amount of the O'Gara Coal Company note set-off against their claim. They were quite willing to have the receiver of the Trust & Savings Bank pay their claim in full, if the assets of the Trust & Savings Bank were sufficient for that purpose, and leave the receiver of the Trust & Savings Bank to take his chances of collecting the $15,000 note out of the O'Gara Coal Company's assets, or out of the collateral, with the possible result that the trustees in bankruptcy might obtain full payment or nearly full payment of their claim and the receiver of the Trust & Savings Bank might not be able to obtain anything on his claim.

Of course, when the O'Gara Coal Company went into bankruptcy the coal business was not very prosperous and

very likely it did not appear to be very prosperous whe the trustees in bankruptcy concluded to take their chance of getting payment of the $19,843.62 out of the assets of the Trust & Savings Bank and leave the receiver of the Trust & Savings Bank to get what he could out of the assets of the O'Gara Coal Company or out of the collateral.

Since, however, the coal business has picked up and the O'Gara Coal Company's financial affairs have greatly improved and it is to the interest of the trustees in bankruptcy to now claim the right of set-off, they wish to retrace their steps and do what they now claim they might have done at any time.

Would it be just to the other creditors of the Trust & Savings Bank to allow the right of set-off to be now asserted? We submit that it would not, but that justice requires that the trustee in bankruptcy should be held bound by the election thus made and acted upon.

A peculiar feature of this situation must not be overlooked and that is that the trustee in bankruptcy, by accepting the dividends from the estate of the insolvent Trust and Savings Bank, received several thousand dollars more than, according to his present contention, he was entitled to. This money he has wrongfully retained more than four years and now finds it necessary to pay back in order to obtain the relief to which he claims to be entitled. That he did not get still more than he now claims to be entitled to is not his fault, but has resulted from the fact that no further dividends have been paid by the receiver of the Trust and Savings Bank.

If there ever was a case where the doctrine of estoppel was applicable, it is submitted that this is one. It would

seem to be a clear case of election of remedies which is binding upon the party making the election.

In re Berry, 174 Fed. 409; 98 C. C. A. 360.

Standard Varnish Works v. *Haydock*, 143 Fed. 318; 74 C. C. A. 456.

20 Corpus Juris 32.

VII.

THIS MATTER HAS BECOME RES ADJUDICATA.

Apart from the objection of estoppel, it is submitted that this matter has become *res adjudicata* by the decree of the Circuit Court of Cook County. The jurisdiction of the Circuit Court over the controversy was as complete as of that court over the controversy was as complete as would have been the jurisdiction of the United States District Court had the jurisdiction of the latter been invoked by the trustees in bankruptcy instead of their proceeding in the state court. The relief granted by the state court was entirely inconsistent with the relief now claimed by the trustee in bankruptcy, and hence to grant the relief the trustee now claims would operate as a review of the decree of the state court by the United States District Court and that, too, after the decree of the state court has been partly carried into execution. This, it is respectfully submitted, cannot be permitted.

VIII.

CONCLUSION.

The contentions of the respondent may, therefore, be summarized as follows:

First. The bank, or its receiver, had the right at any time after adjudication in bankruptcy to convert the collateral into money and apply the proceeds in payment, or partial payment, of the note.

Second. That which the bank or its receiver had the right to do after the adjudication must, for the purpose of determining the rights of the parties in this proceeding, be treated as having been done.

Third. The situation would not be different, from a legal standpoint, from what it would have been, if, at the time of the adjudication in bankruptcy, the value of the collateral had been on deposit in the bank to the credit of the bankrupt, in which case it would have been applied as a credit upon the note.

Fourth. If the bankruptcy court had jurisdiction of the case it could only deal with it as one involving the right of the bankrupt estate to set-off its claim against the balance due upon the note after applying thereon the value of the collateral.

Fifth. The bankruptcy court had no jurisdiction to determine the question of set-off because Niblack, as receiver of the bank, had no right to enter his appearance in the bankrupty court for the purpose of enabling himself, as trustee of the bankrupt estate, to enforce a claim against himself as receiver of the bank which could not have been enforced by the bankruptcy court had he not so entered his appearance.

Sixth. Even if the claim of the receiver of the bank

had been an unsecured claim and the bankruptcy court had had jurisdiction of the matter of set-off, the claim of the bankrupt estate could not have been set off against the note, the right of set-off not being mutual and reciprocal.

Seventh. The proof by the trustees in bankruptcy of their claim in the state court, its allowance by that court as a general claim and the acceptance by the bankrupt estate of dividends thereon are a bar to any proceeding for the enforcement of a right of set-off.

HIRAM T. GILBERT,
Counsel for Respondent.

No. 846 317

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1921.

FRANK G. GARDNER, as Trustee in Bankruptcy of the O'Gara Coal Company, Petitioner, vs. **CHICAGO TITLE AND TRUST COMPANY**, as Receiver of the La Salle Street Trust and Savings Bank, Respondent.	Petition for Writ of Certiorari to Circuit Court of Appeals, Seventh Circuit.

BRIEF FOR RESPONDENT.

HIRAM T. GILBERT,
Attorney for Respondent.

BARNARD & MILLER PRINT, CHICAGO.

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Brief for Respondent.

In answer to the points discussed by petitioner the respondent presents the following:

I.

A DEPOSIT MADE BY A TRUSTEE IN BANKRUPTCY OF HIS TRUST FUNDS IS NO MORE SACRED, IN THE EYE OF THE LAW, THAN A DEPOSIT MADE BY A WASHERWOMAN OF HER SAVINGS.

The claim is made by petitioner that because petitioner is a trustee in bankruptcy and the La Salle Street Trust & Savings Bank was duly appointed by the District Court as a depositary of the funds of estates of bankrupts, petitioner's position as a depositor of the bank entitles him to some rights which are not accorded to other depositors. No authority is cited which supports any such proposition.

The La Salle Street Trust & Savings Bank, by receiving the deposit of the trustee in bankruptcy, did not make itself a trustee nor did it make the funds deposited trust funds. No other relation was created between the trustee in bankruptcy and the bank than that existing between an ordinary depositor and the bank which receives his deposit. When deposits are made in a bank the money deposited becomes the money of the bank and the bank becomes a debtor and the depositor a creditor to the amount of the deposit.

No reason can be alleged why a trustee in bankruptcy should have greater rights as against a bank than a washerwoman who deposits her savings in the bank. Both are unfortunate and neither one should be permitted to claim an advantage over the other.

II.

THERE IS NOTHING IN THE CIRCUMSTANCES OF THIS CASE TO JUSTIFY TREATING IT AS AN EXCEPTION TO THE RULE THAT THE RIGHT OF SET OFF MUST BE MUTUAL.

It cannot be contended that at the time the La Salle Street Trust & Savings Bank suspended its receiver could have applied the deposit of the trustee in bankruptcy in payment of the bankrupt's note, leaving the trustee in bankruptcy a claim for the difference between the amount of the note and the amount of the deposit. No court would have permitted him to do this. On the other hand it cannot be successfully contended that the trustee in bankruptcy might have applied the deposit so far as necessary to the extinguishment of the note of the bankrupt and prosecuted his claim against the insolvent bank for the balance. The amount deposited in the bank might have been the only asset possessed by the bankrupt

for the payment of its debts and the result of the application of this deposit to the payment of the debt due the bank from the bankrupt would have been to give the bank a preference over other creditors.

The circumstance that the trustee in bankruptcy deposited the funds of the bankrupt estate in the La Salle Street Trust & Savings Bank instead of in some other bank is not important. Another bank in which the deposit might have been made might also have become insolvent, in which case the trustee in bankruptcy would have been compelled to content himself with such dividends as might be declared by the insolvent bank.

III.

THE DEPOSITORS OF THE TRUST AND SAVINGS BANK SHOULD NOT BE PUNISHED FOR ITS SINS.

It is suggested that the La Salle Street Trust & Savings Bank embezzled the funds deposited by the trustee in bankruptcy and thereby betrayed the trust reposed in it by law and by the court.

A poor washerwoman who deposited her savings in the La Salle Street Trust & Savings Bank would have just as good ground as the trustee in bankruptcy for asserting that the bank had embezzled her money and had betrayed the trust reposed in it by her. Indeed, she might have a better cause of complaint than the trustee in bankruptcy, for she might allege that the loan made by the bank to the bankrupt only a few days prior to its going into bankruptcy was one of the causes of the insolvency of the bank and of the loss by her of her savings.

It must not be overlooked that the court in this case is not dealing with a controversy between the bankrupt on one side and the bank on the other. The bankrupt

and the bank are both, as a matter of law, dead. The real parties in interest are the creditors of the bankrupt on the one side and the creditors of the bank on the other and neither set of creditors can be justly charged with the sins of their respective debtors. They have not sinned, but have been sinned against. There would be just as much propriety in punishing the creditors of the bankrupt for its sins as there would be in punishing the creditors of the bank for its sins.

IV.

THE TRUSTEE IN BANKRUPTCY IS ESTOPPED FROM CLAIMING ANY RIGHT OF SET OFF.

Even if the trustee in bankruptcy subsequent to the insolvency of the bank was in a position to assert a right of set-off he lost that right through his subsequent conduct.

In June, 1916, nearly two years after the Trust & Savings Bank suspended, when, according to the present contention of petitioner, he might have presented his petition in the bankruptcy proceeding and secured an order setting off so much of the deposit account of $19,843.62 against the $15,000 note of the O'Gara Coal Company as was necessary to satisfy it, he voluntarily entered his appearance in the State court and sought and obtained an order of that court for the payment in full of the $19,843.62 out of the assets of the Trust & Savings Bank in due course of administration pro rata with the Trust & Savings Bank's other creditors. He expressed no willingness to have the amount of the O'Gara Coal Company note set off against his claim. He was quite willing to have the receiver of the Trust & Savings Bank pay his claim in full, if the assets of the Trust & Savings Bank were sufficient for that purpose, and leave the receiver of the Trust & Savings Bank to take his chances of collecting the

$15,000 note out of the O'Gara Coal Company's assets or out of the collateral, with the possible result that the trustee in bankruptcy might obtain full payment or nearly full payment of his claim and the receiver of the Trust & Savings Bank might not be able to obtain anything upon his claim.

Of course, when the O'Gara Coal Company went into bankruptcy the coal business was not very prosperous and very likely it did not appear to be very prosperous when the trustee in bankruptcy concluded to take his chance of getting payment of the $19,843.62 out of the assets of the Trust & Savings Bank and leave the receiver of the Trust & Savings Bank to get what he could out of the assets of the O'Gara Coal Company or out of the collateral.

Since, however, the coal business has picked up and the O'Gara Coal Company's financial affairs have greatly improved and it is to the best interests of the trustees in bankruptcy to now claim the right of set-off, he wishes to retrace his steps and do what he now claims he might have done at any time.

A peculiar feature of this situation must not be overlooked and that is that the trustee in bankruptcy, by accepting the dividends from the estate of the insolvent Trust & Savings Bank received several thousand dollars more than, according to his present contention, he was entitled to. This money he has wrongfully retained more than four years and now finds it necessary to pay it back in order to obtain the relief to which he claims to be entitled. That he did not get still more he now claims to be entitled to is not his fault, but has resulted from the fact that no further dividends have been paid thus far by the receiver of the Trust & Savings Bank.

If there ever was a case where the doctrine of estoppel was applicable it is submitted that this is one. It would

seem to be a clear case of election of remedies which is binding upon the parties making the election.

In re Berry, 174 Fed. 409; 99 C. C. A. 360.

Standard Varnish Works v. *Haydock*, 143 Fed. 318; 14 C. C. A. 456.

20 Corpus Juris 32.

V.

THIS MATTER HAS BECOME RES ADJUDICATA.

Apart from the objection of estoppel it is submitted that this matter has become *res adjudicata* by the decree of the Circuit Court of Cook County. The jurisdiction of that court over the controversy was as complete as would have been the jurisdiction of the United States District Court had the jurisdiction of the latter been invoked by the trustee in bankruptcy instead of his proceeding in the State court. The relief granted by the State court was entirely inconsistent with the relief now claimed by the trustee in bankruptcy, and hence to gain the relief the trustee now claims would operate as a review of the decree of the State court by the United States District Court and that, too, after the decree of the State court has been partly carried into execution. This, it is respectfully submitted, cannot be allowed.

We, therefore, insist that the order of the Circuit Court of Appeals was right and that the petition for a writ of certiorari should be denied.

....

Attorney for Respondent.

GARDNER, AS TRUSTEE IN BANKRUPTCY OF O'GARA COAL COMPANY, v. CHICAGO TITLE & TRUST COMPANY, AS RECEIVER OF LA SALLE STREET TRUST & SAVINGS BANK.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 317. Argued March 15, 1923.—Decided April 9, 1923.

A state bank, holding a secured note, the maker of which became a bankrupt, itself went into insolvency proceedings under the state law after it had accepted, with knowledge of the bankruptcy, deposits of funds of the bankrupt estate made by the trustees in bankruptcy, who were not shown to have known of the note at the time.

Held that the bankruptcy court should allow the bank's claim for the amount due on the note, above the value of the security, but withhold dividends until the debt due the trustees had been paid. P. 456.

278 Fed. 509, reversed.

Certiorari to an order of the Circuit Court of Appeals directing dismissal of a petition for set-off made by a trustee in bankruptcy.

Mr. Arthur M. Cox, with whom *Mr. Henry M. Wolf* and *Mr. A. F. Reichmann* were on the briefs, for petitioner.

Mr. Hiram T. Gilbert for respondent.

The relation of a depositary to the trustees of a bankrupt estate is not fiduciary but is simply that of debtor and creditor.

This point is *res judicata* by the decision of the Circuit Court of Cook County allowing the claim of the trustees in bankruptcy as a general claim.

There is no statute expressly making deposits of trustees in bankruptcy preferred claims, nor is there any rule of construction or other authority for holding that be-

cause depositaries are provided for by law the deposits they receive as such are to be regarded as preferred claims.

As a secured creditor the receiver of the bank occupied a position essentially different from that of an unsecured creditor.

At the time of the adjudication in bankruptcy, the bank had the right to apply the collateral upon the note and present its claim against the bankrupt estate for the balance. This right could not be changed by subsequent events. The case is no different from what it would have been had the bankrupt, at the time of the bankruptcy, had on deposit in the bank an amount of money equal to the value of the collateral.

No right of set-off existed in favor of the trustees in bankruptcy as against the receiver of the Trust & Savings Bank. The right of set-off is reciprocal. 34 Cyc. 723; *In re United Grocery Co.*, 253 Fed. 267.

The rights of the parties were fixed at the time of the suspension of the bank and could not be subsequently changed. If there was a right of set-off at that time it was a mutual right and not a right which only one party could then avail itself of. *People* v. *California Safe Deposit & Trust Co.*, 168 Cal. 241; *In re Harper*, 175 Fed. 412; *In re Siegel-Hillman Dry Goods Co.*, 111 Fed. 980; *Scott* v. *Armstrong*, 146 U. S. 499; *In re Chrystal Spring Bottling Co.*, 100 Fed. 265, distinguished.

The controversy here is not one between the O'Gara Coal Company and the bank, but is one between the creditors of the bankrupt company and the creditors of the insolvent bank.

The rights of the Coal Company's creditors were fixed on the date of the filing of the petition in bankruptcy and those of the Bank were fixed on the date of its suspension.

The maxims "He who seeks equity should do equity," and "He who comes into equity should have clean hands," have no application to this case.

The trustees in bankruptcy having obtained an order of the state court for the payment of the $19,843.62 out of the assets of the Bank in due course of administration *pro rata* with the Trust & Savings Bank's other creditors, and having received dividends thereon, are estopped from now claiming the right to retrace their steps and pay back part of the money which they received and have their right of set-off enforced.

This matter has become *res judicata*. The jurisdiction of the state court was complete. The relief granted by it was entirely inconsistent with the relief now claimed by the trustee in bankruptcy and to grant the relief the trustee now claims would operate as a review of the decree of the state court by the courts of the United States.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This case arises in the matter of O'Gara Coal Company, bankrupt, upon a petition for a setoff presented by the trustee of the bankrupt estate. The respondent is the receiver of the La Salle Street Trust and Savings Bank. When the Coal Company became bankrupt in 1913, the Bank held its note for $15,000, with security. Between November 11, 1913, and June 11, 1914, the trustees of the Coal Company in bankruptcy deposited in the Bank, an authorized depositary, and were credited as such trustees with funds of their estate, which amounted to nearly $20,000 on June 12, 1914, when the Bank suspended business, insolvent. A receiver was appointed by a State Court a few days later. The trustees of the Coal Company filed a claim for the amount of their deposit in 1916, and in 1916 and again in 1918 received dividends upon it. On the other side the receiver of the Bank filed a proof of the Bank's claim as unsecured in 1914 but amended it to proof of a secured claim in 1917. The peti-

tion before us seeks to setoff the claim of the petitioner for the deposit in the Bank, less the dividends received, against the claim of the Bank upon the note. The Circuit Court of Appeals denied the setoff and ordered the petition to be dismissed. 278 Fed. 509.

We assume that when money is deposited in a designated bank under § 61 of the Bankruptcy Law of July 1, 1898, c. 541, 30 Stat. 562, it is deposited as other money is, and becomes the property of the bank, leaving the bank a debtor for the amount. But when this money was deposited with this Bank it seems that the Bank had notice that it was part of a fund appropriated to paying the Coal Company's debts, of which the note held by the Bank was one. We think that it would be inequitable to allow the Bank to proceed to diminish that fund without accounting for the portion that it had received. When the Bank accepted deposits from a fund against which it had a credit it must be taken to have known that it could not profit by the fact at the expense of other claimants. The Bank knew the whole situation. There is nothing to show that the Trustees of the Coal Company when they made their deposits knew that the Bank held the Coal Company's note. If they had known this fact it would be going far to say that they altered or could alter the position of their *cestuis que trust* for the worse. On the other hand the creditors of the Bank can stand no better than the Bank.

The Bankruptcy Court may allow the Bank's claim for such sum only as may seem to the Court to be owing above the value of the security, § 57e, and may withhold dividends upon that sum until the debt due to the trustee has been paid. *Western Tie & Timber Co.* v. *Brown,* 196 U. S. 502, 511.

Decree reversed.